IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 188.

ANCHOR OIL COMPANY, *Appellant,*

vs.

W. H. GRAY, *ET AL., Appellees.*

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BRIEF OF *AMICI CURIAE.*

May It Please the Court:

On account of the vast and far-reaching importance of the very first question in this case, to-wit, "Is an oil and gas mining lease executed since May 27, 1908, by a full-blood Creek Indian heir of a deceased allottee void without the approval of the Secretary of the Interior?" we beg to be heard on behalf of numerous oil lessees, not parties to this case, who have invested millions of dollars in oil leases executed by full-blood heirs since the Act of Congress of May 27, 1908, with the approval of the County Courts.

In further explanation of our intervention with this brief, we emphatically state that neither our cli-

ents nor the oil producers in general are averse to the policy of the Federal Government in interposing governmental supervision over the leasing of Indian lands for oil and gas purposes. While the full-blood Indian heir is not always competent to protect his interest without the assistance of some federal agency, he is by no means free from cunning, greed, graft, and avarice. When property becomes valuable for oil, the scheming and unscrupulous grafter can easily prevail upon an Indian to prefer false and groundless charges that the lease was obtained by fraud. Whereas, when the lease has been approved by the Interior Department or the County Court, or some federal agency, the Government representatives are good witnesses for the operator, and as a consequence very few suits have been commenced attacking leases approved by the Secretary or by the County Court.

Some sort of governmental supervision seems to impart to such leases a certain immunity from attack by designing grafters. But here the Interior Department claimed no jurisdiction to approve leases executed by full-blood heirs for about 10 years, and though hundreds of such leases were made and approved by the County Courts, the Federal Government has not assailed their validity, nor did the Interior Department call them in question until about two years ago.

Now to go back and sustain Departmental jurisdiction and adjudge all such leases void without the

Secretary's approval, though approved by the County Courts, means financial ruin and disaster to hundreds of honest operators and those who have invested their money in such enterprises.

The appellant, as plaintiff below, claims the oil and gas mining leasehold rights in the land in question under two oil and gas mining leases executed by the full-blood Creek Indian heirs of the deceased full-blood Indian allottee, Jennie Samuels, who died on October 11, 1915, after having executed a lease on the Departmental form on December 5, 1914, under which appellees claim the oil and gas mining leasehold rights. It is admitted that Jennie Samuels, being a full-blood Creek Indian, could not lease her land for oil purposes except with the approval of the Secretary of the Interior. Her lease of December 5, 1914, on the form prescribed by the Secretary of the Interior and expressly made subject to his approval, was not approved by the Secretary until October 21, 1915, 10 days after her death. Appellant contended in the District Court and in the Court of Appeals that the Secretary's approval after the death of the allottee was a nullity upon the theory that the Act of Congress of May 27, 1908 (35 Stat. L. 312), Section 9 thereof, abrogated the Secretary's jurisdiction, etc. We are not concerned with that point. If, however, the full-blood Indian heirs of the deceased allottee had no power to lease the land without the approval of the Secretary of the Interior, then the appellant's case at its very threshold must

be dismissed under the well settled principles that a plaintiff without right or title can have no relief by way of cancellation, injunction, etc., against a defendant. The leases under which appellant claims were not approved by the Secretary of the Interior, but approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee, and, of course, if the Secretary's approval is necessary to the validity of appellant's leases, they are void for want of his approval and consequently the court will not enter upon a consideration and decision of the questions presented against the validity of the prior lease executed by the allottee during her lifetime.

The Question:

The question whether or not full-blood Indian heirs can lease inherited allotments for oil and gas with the approval of the County Court having jurisdiction of the estate of the deceased allottee, and without the approval of the Secretary of the Interior, involves a consideration of the history of the various laws pertaining to the affairs of the Five Civilized Tribes, and immediately and ultimately involves the construction of the Act of Congress of May 27, 1908 (35 Stat. L. 312), and particularly the following sections:

> *Sec. 2.* "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the *allottee* if an

adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Sec. 3. "That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

"That no oil, gas or other mineral lease entered into by any of said *allottees* prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this act, but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Pro-*

vided, That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate."

Sec. 9. "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That *no conveyance of any interest* of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until

April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided, further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

We submit the following premises:

POINT ONE.

The general restriction against alienation imposed by the various agreements with the respective nations comprising the Five Civilized Tribes and the various Acts of Congress, operated to prohibit not only conveying the fee title by deed, but also leasing for mineral purposes—or said another way—the general restriction against alienation was a ban on leasing as well as on deeds because a lease is an alienation.

POINT TWO.

The converse of Point One is true: the removal of restrictions against alienation is a removal of restrictions against leasing.

POINT THREE.

Unless clearly and expressly provided otherwise, the restriction against CONVEYING, without the approval of a DESIGNATED Federal agency—the Secretary of the Interior or the County Court—includes a restriction against leasing for mineral purposes without the approval of the SAME Federal agency.

POINT FOUR.

The removal of all restrictions against alienation of allotments inherited by adult mixed-blood Indian heirs, coupled with the grant of power to full-blood Indian heirs to make CONVEYANCES of inherited allotments with the approval of the Secretary of the Interior, included the grant of power to such full-blood heirs to lease for mineral purposes inherited lands with the Secretary's approval. (See Section 22 of the Act of April 26, 1906, 34 St. L. 137.)

Section 22 of the Act of April 26th, 1906, is as follows:

> "That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory,

then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. *All conveyances* made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

POINT FIVE.

Likewise, under Section 9 of the Act of Congress of May 27th, 1908, the power of a full-blood Indian heir to make a "CONVEYANCE OF ANY INTEREST OF (SUCH) ANY FULL-BLOOD HEIR IN SUCH" inherited land with the approval of the County Court, conferred the power to lease inherited land for mineral purposes with the approval of the SAME Federal agency—the proper County Court.

POINT SIX.

An examination of the various agreements with the respective tribes and Acts of Congress pertaining to the Indians, discloses a consistent legislative scheme to impose in each act, *first*, general and absolute restrictions against alienation, and, *second*, then by a proviso to the paragraph imposing the general restrictions or by another paragraph in the nature of a proviso, modify the general restrictions so as to permit leasing for a limited period or with the approval of the Secretary of the Interior, or the County Court.

The premises and conclusions set forth in the

above five points are clearly sustained by an examination of the various agreements with the tribes and Acts of Congress pertaining thereto.

A.

Statutes in pari materia are to be construed together; each legislative act is to be interpreted with reference to other acts relating to the same matter or subject.

It is unnecessary to cite authorities in support of the above proposition, as this court has frequently applied this rule in construing the Indian Agreements and Acts of Congress pertaining to the Five Civilized Tribes as well as other tribes.

—*Tiger* v. *Western Investment Co.*, 221 U. S. 286;
United States v. *First National Bank*, 234 U. S. 246;
Heckman v. *United States*, 224 U. S. 413;
Mullen v. *United States*, 224 U. S. 448;
Goat v. *United States*, 224 U. S. 458.

However, Black on Interpretation of Laws, page 204, says:

> "The reasons which support this rule are two-fold. In the first place, all the enactments of the same legislature on the same general subject-matter are to be regarded as parts of one uniform system. *Later statutes are considered as supplementary or complementary to the earlier enactments.* In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the *continued mod-*

ification and adaptation of the original design to apply it to changing conditions or circumstances. In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the *existing legislation on the same subject*, and to have shaped its new enactment with reference thereto. Hence the same principle which requires us to study the context for the meaning of a *particular phrase or provision*, and which directs us to compare all the several parts of the same statute, only takes on a broader scope when it bids us read together, and with reference to each other, all statutes *in pari materia. Whatever is ambiguous or obscure in a given statute will be best explained by a consideration of analogous provisions in other acts relating to the same subject, or by a study of the general policy which pervades the whole system of legislation. Secondly*, the rule derives support from the principle which requires that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between different enactments of the same legislature. To achieve this result, it is necessary to consider all previous acts relating to the same matters, and to construe the act in hand so as to avoid, as far as it may be possible, any conflict between them. Hence, for example, when the legislature has used a *word* in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using the word in the same sense, unless there is something in the context or in the nature of things to indicate that it intended a different meaning thereby."

See also, Endlich on Interpretation of Laws, Section 53.

B.

Although the courts in arriving at a construction of a particular Act of Congress should examine the prior state of the law and consider statutes in pari materia, the clear meaning of a statute can neither be avoided nor subverted in the name of so-called public policy. The public policy of a state or nation must be determined by its constitution, laws and judicial decisions, and not by the varying opinion of laymen, lawyers or judges as to the demands or interests of the public. Restrictions against leasing for mineral purposes without the approval of the Secretary of the Interior cannot be judicially imposed in the name of so-called Indian policy, if there is any such thing.

Thus, in *United States* v. *First National Bank*, 234 U. S. 245-260, this court in refusing to sustain the contention of the Government that certain Indian lands were within the restrictions against alienation, said:

> "The Government further insists that its interpretation of the act is consistent with its policy to make competency the test of the right to alienate, and that the legislation in question proceeds upon the theory that those of half or more white blood are more likely to be able to take care of themselves in making contracts and disposing of their lands than those of lesser admixture of such blood. *But the policy of the Government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this*

case, afford an unstable ground of statutory interpretation." (Italics ours.)

In determining what is the policy of Congress with respect to the question involved in this case, the court must find that policy expressed in the statutes and various agreements with the tribes and judicial decisions based thereon, and the varying opinion of laymen, lawyers or judges as to the demands or interests of the Indians have nothing to do with this case.

—*Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 44 L. ed. 84;
Hartford Fire Ins. Co. v. *Chicago, M. & St. P. R. Co.*, 70 Fed. 201, 30 L. R. A. 193;
United States v. *Trans-Missouri Freight Association*, 58 Fed. 58, 24 L. R. A. 73;
Vidal v. *Girard's Ex'rs*, 2 How. 127, 11 L. ed. 205;
People v. *Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736;
Swann v. *Swann*, 21 Fed. 299.

Prior Laws.

The Original Curtis Act (30 Stat. L. 495), approved June 28, 1898, authorized the Dawes Commission to make up a roll of the citizens of the various tribes, to-wit: Choctaws, Chickasaws, Cherokees, Seminoles and Creeks. Section 11 directed the Dawes Commission, when the rolls were complete, to "proceed to allot the exclusive use and occupancy of the surface of the lands of the nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll." Under the said Original Cur-

tis Act the Dawes Commission opened a land office at Muskogee on April 1st, 1899, and made about 8,000 Creek allotments. The allottees took no assignable or inheritable interest or anything more than the right to use and occupy the surface during their lifetime. (*Woodward* v. *deGraffenried*, 238 U. S. 284.) *There were no Curtis Bill allotments made in any of the other tribes.* The Curtis Bill allottee acquired no title to the minerals, but Section 13 of the act authorized the Secretary of the Interior to make oil, coal, asphalt and other mineral leases, neither the consent of the tribes nor individual citizens being necessary.

Creek Agreements:

Thereafter, and in 1900, the Dawes Commission negotiated an agreement with the Creek tribe, which was approved by the Act of Congress of March 1st, 1901 (31 Stat. L. 861), ratified by the Creek Nation May 25, 1901. We shall herein refer to the above agreement with the Creek tribe, approved by the Act of March 1, 1901 (31 Stat. L. 861), as the "Original Creek Agreement." This agreement provided for the allotment of the tribal land to the citizens in fee, thus conveying to the allottees the absolute legal and equitable title to the land, including all minerals therein. By virtue of Section 6 of the Original Creek Agreement, Curtis Bill allotments were confirmed and the fee title vested in the allottee, if living, or in his heirs, if deceased. (*Woodward* v. *deGraffenried*, 238 U. S. 284.)

Section 7 of the Original Creek Agreement provides that:

> "Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed of the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior,"

and made further provisions about the homestead which is not pertinent here.

The Original Creek Agreement made no express provision for *mineral leases*, but Section 37 thereof provided that "Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction, if adjoining allottees are not injured thereby, and cattle grazed thereon shall not be liable to any tribal tax, etc." The declaration under Section 7 of the Original Creek Agreement that "such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior," was held by the Oklahoma Supreme Court in *Barnes* v. *Stonebraker*, 28 Okla. 75, to be a restriction against leasing the allotment for oil and gas purposes, without the Secretary's approval. That decision is based upon the theory that an oil and gas mining lease is an

alienation, and Section 7 having prohibited the alienation without the Secretary's approval, an unapproved lease was void.

Thereafter, and in 1901, the Dawes Commission negotiated a Supplemental Agreement with the Creek tribe, which was approved by the Act of Congress of June 30, 1902 (32 Stat. L. 500), ratified by the Creek Nation July 26, 1902, and made effective by Presidential Proclamation on August 8, 1902. We shall refer to that Act of Congress as the "Supplemental Creek Agreement." Section 16 of the Supplemental Agreement is a substitute for Section 7 of the Original Creek Agreement, and is as follows:

> "Lands allotted to citizens shall not in any manner whatever, or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.
>
> "Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any rea-

son such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise precribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Section 37 of the Original Creek Agreement was amended by Section 17 of the Supplemental Creek Agreement to read as follows:

"Creek citizens may rent *their allotments*, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for *mineral* purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cat-

tle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and Section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands."

Choctaw-Chickasaw:

Provision was made for the allotment of the Choctaw and Chickasaw lands by what is known as the "*Atoka Agreement*" embodied in Section 29 of the Curtis Bill, being the act approved June 30, 1898 (30 Stat. L. 495). The Atoka Agreement made provision for allotment to the Indians and freedmen and provided that "all coal and asphalt in or under the lands allotted and reserved from allotment, shall be reserved for the sole use of the members of the Choctaw and Chickasaw tribes, exclusive of freedmen," and further provided:

> "It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw Nations shall remain and be the common property of the members of the Choctaw and Chickasaw Tribes (freedmen excepted), so that each and every member shall have an equal and undivided interest in the whole; and no patent provided for in this agreement shall convey any title thereto. The revenues from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes."

Provision was made for the payment of royalties from the coal and asphalt into the Treasury of the United States, to be drawn therefrom under rules and regulations prescribed by the Secretary of the Interior. With respect to restrictions against alienation, the Atoka Agreement provided:

> "All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed *twenty-one years from date of patent*, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.
>
> "That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void."

Under the above quoted provision, the entire allotment was *(a)* non-taxable while the title remained in the original allottee, not to exceed 21 years from the date of patent; *(b)* the homestead of 160 acres was inalienable for 21 years from date of patent;

(c) the surplus was alienable, one-fourth in one year, one-fourth in three years, and the balance in five years from the date of patent; *(d)* contracts for the sale or incumbrance of any of the allotment were declared null and void. The Secretary of the Interior was not given the authority to approve conveyances. The restrictions against alienation for the period designated were absolute. The only provision with respect to leasing is as follows:

> "No *allottee* shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States Court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder, and no such lease or any sale shall be valid as against the *allottee* unless providing to him a reasonable compensation for the lands sold or leased."

The restrictions against alienation ran with the land, and operated to bind the heir, as well as the allottee. The clause against alienation did not say that the *allottee* shall not alienate but that the homestead "shall be inalienable for 21 years from date of patent," and that the surplus "shall be alienable * * * one-fourth in one year, one-fourth in three years, and the balance * * * alienable in five years from the date of the patent." The statutory dec-

laration that the allotment shall be inalienable for a designated period of time without prohibiting any particular person, that is, the allottee, from alienating within that period, imposed restrictions on the land. The restrictions under the language used were not personal but ran with the land and bound the heirs as well as the allottee. This court so held in construing a similar restriction in *Bowling* v. *United States*, 233 U. S. 528. See also:

United States v. *Noble*, 237 U. S. 74;
Aaron v. *United States*, 204 Fed. 943;
Reed v. *Clinton*, 23 Okla. 610.

But a statute not declaring in substance that "the lands allotted shall not be alienated" before the end of a specified number of years or that "lands allotted shall not be alienated by the allottee or his heirs" before the end of a designated period imposes no restraint on the allottee's heirs, though it may expressly prohibit the allottee from alienating. Thus a statute prohibiting "alienation by the allottee" or declaring "lands allotted shall not be alienated by the allottee" does not restrain the heir. Such restrictions are merely personal to the allottee like the disability of minority or of a married woman under the common law, and the heirs are free to alienate.

—*Clark* v. *Lord*, 20 Kan. 390;
McMahon v. *Welsh*, 11 Kan. 280;
Oliver v. *Forbes*, 17 Kan. 128;
Hancock v. *Mutual Trust Co.*, 24 Okla. 391;
Frederick v. *Gray*, 12 Kan. 518.

Restrictions against alienation by Indian heirs will not be implied from the circumstance that the allottee was restrained from alienating.

—*Skelton* v. *Dill*, 235 U. S. 206;
Adkins v. *Arnold*, 235 U. S. 417.

The above quoted provision in regard to leasing is, in effect, a removal of restrictions against alienation to the extent that the *allottee* may lease his allotment, or a portion thereof, for a period not longer than five years, and without any privilege of renewal. It is clear under the authorities we shall hereafter cite that a broad restriction against alienation and incumbering includes all degrees of alienation, such as leasing. Especially a mineral lease for oil, gas, coal, or any other mineral purpose authorizing the lessee to extract from the allotment the minerals, is an alienation within the meaning of the act. As the coal and asphalt were reserved to the tribe, the allottee had no authority to lease his land even for five years for coal or asphalt purposes.

Now we pass to the Choctaw-Chickasaw Supplemental Agreement:

The Supplemental Agreement with the Choctaw-Chickasaws was approved by Act of Congress of July 1, 1902, and ratified by the nations and became effective September 25, 1902 (32 Stat. L. 641). Section 26 of that agreement authorized the Secretary of the Interior to segregate and reserve from allotment lands containing coal and asphalt deposits, and sections 56 to 63, inclusive, provide for the segrega-

tion and sale of coal and asphalt lands. Section 58 prohibits the allotment of the segregated coal and asphalt lands, but provides that "*all coal and asphalt deposits, as well as other minerals which may be found in any lands not so segregated and reserved, shall be deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands.*" Section 61 prohibits the leasing of coal and asphalt lands "the provisions of the Atoka Agreement to the contrary notwithstanding." While the Supplemental Agreement is comprehensive and apparently covers the whole subject of allotting the tribal lands, it contains no reference to the leasing of allotments by either the allottee or his heirs for either agricultural or mineral purposes; but specific and express provisions restricting alienation by the allottee or his heirs are contained in the Supplemental Agreement. Thus, Section 12 is as follows:

> "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average alottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

The above restrictions against the alienation of the 160-acre homestead being for a period "during

the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment," is NOT by itself a restriction against alienation by the heirs.

Section 13 applies to freedmen and restrains the alienation "during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of the allotment." Section 15, is as follows:

> "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

Section 16 is as follows:

> "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That *such land* shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

The only restrictions against alienation by the heirs are found under Section 16 above quoted. That express restriction against alienation by the heirs was no doubt inserted because the restrictions imposed by the preceding sections clearly did not run with the land, but applied to the allottee in person.

This court construed Sections 12, 15 and 16 in *Gannon* v. *Johnston*, 243 U. S. 108, and held that Section 16 expressly applied restrictions to the heirs. Mr. Justice DAY, speaking for the court, said:

> "Section 16 makes the land alienable after the issuance of patent, except as to the homestead, *not involved here*, one-fourth in acreage in one year, one-fourth in three years, and the balance in five years from the date of the patent, and provides that the lands shall not be alienable by the allottee, 'or his heirs,' at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than the appraised value."

The Secretary was given no power to either remove the restrictions or approve conveyances in fee or by lease.

The restrictions against alienation imposed by Sections 12, 13, 15 and 16 of the Choctaw-Chickasaw Supplemental Agreement disqualified the allottee and *his heir* from leasing the allotment for oil and gas purposes, as such a lease grants to the lessee the right to occupy the land and extract therefrom a portion of the corpus thereof—frequently the most valuable part of the allotment.

These unqualified restrictions either operated to repeal the prior provisions of the Atoka Agreement allowing the allottee to lease for a period not exceeding five years without the Secretary's approval or left the allottee possessed of the power to lease the allotment for a period not beyond five years for

mineral and agricultural purposes, without the Secretary's approval. If the leasing provision of the Atoka Agreement modifying the restrictions against alienation imposed by the Atoka Agreement, so as to permit the allottee to lease his allotment for a period not beyond five years without the privilege of renewal, survived the Supplemental Choctaw-Chickasaw Agreement—that is, if the leasing provision of the Atoka Agreement was not repealed by the Supplemental Agreement on the theory that the Supplemental Agreement is general, whereas the leasing provision of the Atoka Agreement was special legislation—then we have the allottee empowered to lease his allotment for oil and gas purposes for a period not beyond five years without the Secretary's approval or the approval of any other federal agency, and that state of affairs existed as to full-blood allottees and full-blood heirs until the Act of April 26th, 1906 (34 Stat. L. 137), and as to mixed-blood *allottees* until the Act of May 27, 1908 (35 Stat. L. 312). A general restriction against alienation includes within its scope a prohibition against leasing, although leasing may not be expressly mentioned.

—*Beck* v. *Flournoy Live Stock & Real Estate Co.*, 65 Fed. 30;
United States v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. 886;
United States v. *Flournoy Live Stock & Real Estate Co.*, 71 Fed. 576;
Taylor v. *Parker*, 235 U. S. 42.

The Kansas Constitution declares that the family homestead "shall not be alienable without the

joint consent of husband and wife," and the Supreme Court of that state has several times held that an oil lease on the family homestead, executed by the husband, the owner of the title, is void unless joined in by the wife.

—*Coughlin* v. *Coughlin*, 26 Kan. 116;
Franklin Land Co. v. *Wea Gas, Coal & Oil Company*, 43 Kan. 518;
Palmer Oil & Gas Co. v. *Parish*, 61 Kan. 311, 59 Pac. 640;
McKinnis v. *Mortgage Company*, 55 Kan. 259;
Brewster v. *Madden*, 15 Kan. 195.

The Oklahoma Supreme Court in two cases has held that an oil and gas mining lease on the family homestead is void unless jointly executed by husband and wife, although the title may be entirely in one spouse.

—*Carter Oil Company* v. *Papp*, .. Okla. ..., 174 Pac. 747;
Francen v. *Oklahoma Star Oil Company*, (not yet officially reported) 13 Okla. App. Court Rep. 313, ... Pac. .....

Under the Texas Constitution providing that the homestead of a family cannot be conveyed by the owner if a married man without the signature and separate acknowledgment of the wife, the husband alone cannot give a lease authorizing the lessee to bore and extract oil and gas from the homestead.

—*Southern Oil Co.* v. *Colquitt*, 69 S. W. 169;
Houston & T. C. Co. v. *Cluck*, 72 S. W. 83.

That a lease is an alienation within the meaning of the restriction against conveying a homestead without the joint consent of husband and wife, see *Mailhot* v. *Turner*, 157 Mich. 167, 133 Am. St. Rep. 333; *Maatta* v. *Kippola*, 102 Mich. 116, 60 N. W. 300; *Pritchett* v. *Davis*, 101 Ga. 236, 65 Am. St. Rep. 298.

If the leasing provision of the Atoka Agreement was repealed, there was no law under which a Choctaw-Chickasaw *full-blood* allottee, or his heirs, could lease the allotment for oil and gas purposes until the Act of Congress of April 26th, 1906, Sections 19, 20 and 22 (34 Stat. L. 137), and no provision under which a *mixed-blood allottee* could lease for mineral or any other purpose until the Act of May 27th, 1908 (35 Stat. L. 312), except that part of the allotment other than the homestead (the surplus) after the restrictions expired under the Supplemental Agreement limitations.

Section 13 of the Curtis Bill, approved by Act of Congress of June 28, 1898 (30 Stat. L. 495), says:

> "That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void."

and provided what shall be done with the royalties, etc. But, as above pointed out, Section 58 of the Choctaw-Chickasaw Supplemental Agreement vest-

ed the oil and gas and all other minerals (except coal and asphalt in segregated lands) in the allottee, and of course that operated either to abrogate the authority of the Secretary of the Interior conferred by Section 13 of the Atoka Agreement to lease the allotted tribal lands for oil and gas, or left that exclusive power in the Secretary. If the power was left in the Secretary to make oil and gas leases on allotted lands in the Choctaw-Chickasaw Nations, then the allottee had no such authority because it is obvious that Congress did not intend to give the Secretary authority to lease allotted lands and at the same time confer authority on the allottee to lease his own allotment. Such a situation is unheard of in the first place, and in the second place it would have created a conflict between the allottee and the Secretary of the Interior and brought about confusion. The Secretary of the Interior never claimed any jurisdiction to execute leases for oil or mineral purposes on allotted lands in the Choctaw and Chickasaw Nations. The only regulations prescribed by the Secretary under the authority of Section 13 of the Atoka Agreement are the regulations of November 4, 1898, and those regulations clearly show that they pertain exclusively to unallotted lands. Then besides, Section 61 of the Supplemental Choctaw and Chickasaw agreement expressly prohibits leasing for coal and asphalt purposes. Another significant thing is this: While the Secretary of the Interior prescribed rules and regulations from time to time under Section 17 of the Supplemental Creek Agreement

of 1902, and Section 72 of the Cherokee Agreement of 1902, with regard to oil and gas leases subject to his approval, he never at any time prescribed oil and gas rules and regulations with respect to such leases on Choctaw-Chickasaw allotments. The first Departmental rules applying to the Choctaw and Chickasaw allotments were prescribed by the Secretary under the authority of Sections 19, 20 and 22 of the Act of Congress of April 26, 1906. Those rules and regulations are general and apply to all the tribes.

We will discuss the Act of April 26, 1906, later and show that even under that act mixed-blood Choctaw and Chickasaw allottees and mixed-blood heirs could not lease allotted lands for oil and gas purposes except that part of the surplus upon which restrictions had expired under the limitations imposed in Sections 15 and 16 of the Choctaw Chickasaw Supplemental Agreement. It must be remembered that in 1906 no oil or gas had been discovered or searched for in the Choctaw-Chickasaw Nation.

Cherokee Agreement:

The only agreement with the Cherokees is embodied in the Act of Congress of July 1, 1902 (32 Stat. L. 716), and ratified by the Cherokee Nation, August 7, 1902. Sections 13, 14 and 15 contain express restrictions against alienation or encumbering the allotment for a period of five years, either by the allottee or the heirs, and exempts the allotment from taxation and debts and obligations of the allottee. Section 72 of the Cherokee Agreement con-

tains the provisions in regard to leasing for agricultural, grazing and mineral purposes, and prohibits leases for a longer period than one year for grazing purposes and authorizes leases "for a period longer than five years for agricultural purposes and for mineral purposes," with the approval of the Secretary of the Interior. Section 72 is as follows:

> "Cherokee citizens may rent *their allotments* when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to remove the same; but leases for a period longer than one year for grazing purposes, and for a period longer than 5 years for agricultural purposes and for *mineral purposes* may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced in to the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands."

Seminole Agreement:

The Original Seminole Agreement was negotiated December 16, 1897, and approved by Act of Con-

gress of July 1, 1898 (30 Stat. L. 567). While the Seminole Agreement provides for an allotment of the lands in fee, the tribe reserved a qualified interest in all coal, mineral, oil, and gas, it being expressly provided that "no lease of any coal, mineral, coal oil, or natural gas, within said nation shall be valid unless made with the tribal government, by and with the consent of the allottee, and approved by the Secretary of the Interior." It is further provided that should any of said minerals be discovered on any allotment, one-half of the royalty should be paid to the allottee and the other one-half into the treasury of the tribal government. The allottee was authorized to lease his allotment for any period not exceeding six years, but the Secretary had no jurisdiction over the leasing other than mineral as above pointed out, it being provided that no lease should become effective until it was approved by the Principal Chief of the Seminole Tribe. It was further provided that "All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void." Also further provided that, "Each allottee shall designate one tract of forty acres which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity." The Seminole agreement was construed in *Goat* v. *United States*, 224 U. S. 456, in which this court said (224 U. S. 470), "The interest of the allottee was a descendible interest." A Supplemental Agreement was negotiated with the Seminoles and approved by Act of Congress of June 22,

1900 (31 Stat. L. 250), but it contains nothing on the subject of restrictions or leasing. Thus the matter stood under the various agreements negotiated with the respective Indian Nations composing the Five Civilized Tribes.

A Brief Resume'.

Seminoles:

She Seminole allottee, while he could lease his allotment with the approval of the Principal Chief for a period not exceeding six years, had no authority to lease his allotment for oil or gas or any mineral purposes. The tribal government had the authority to make the mineral leases with the consent of the allottee and the approval of the Secretary of the Interior.

Choctaw-Chickasaw:

The Atoka Agreement reserved all the coal and asphalt within the Choctaw and Chickasaw Nations as the common property of the tribe, freedmen excepted, and no patent to an allottee was to convey any title to the coal and asphalt. Provision was made for coal and asphalt leasing of the Choctaw-Chickasaw lands by the Secretary of the Interior. The Supplemental Choctaw-Chickasaw Agreement (Section 61 thereof) says that, "No lease of any coal or asphalt lands shall be made after ratification of this agreement, provisions of the Atoka Agreement to the contrary notwithstanding." No reference is made to the oil and gas and the Choctaw-Chickasaw

allottee, by virtue of his patent, became the owner of all the oil and gas in his allotment. There is no provision in either of the Choctaw-Chickasaw agreements authorizing the allottee or his heirs to lease the allotment for oil and gas, unless that power existed under the leasing provision of the Atoka Agreement by which the allottee could lease for not over five years without the Secretary's approval.

Cherokee:

The Cherokee allottee acquired title to the oil and gas in his allotment and was prohibited by Section 72 of the agreement from leasing his allotment "for mineral purposes" except with the approval of the Secretary of the Interior.

Creeks:

The Creek allottee acquired title to all the minerals in his allotment, including the oil and gas, and while the Original Creek Agreement made no reference to mineral leases, the Supplemental Agreement, Section 17 thereof, prohibited "leases for mineral purposes except with the approval of the Secretary of the Interior.

Indian Appropriation Act of April 21, 1904.

Thus the matter stood when Congress passed the Indian Appropriation Act, approved April 21, 1904 (33 Stat. L. 189), one paragraph of which is as follows:

> "And all the restrictions upon the alienation of *lands* of all allottees of either of the Five

Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

Judicial and Departmental Construction of the Indian Appropriation Act of April 21, 1904.

On the 2nd day after the Act of April 21, 1904, the Secretary of the Interior requested an opinion from Assistant Attorney General Campbell, as to whether or not the Act of April 21, 1904, removing restrictions against alienation also repealed restrictions against leasing insofar as allottees not of Indian blood were concerned. Assistant Attorney General Campbell rendered a written opinion (see Appendix "A" hereto) holding that the Indian Appropriation Act only removed restrictions against the sale or conveyance of the fee, and that the Secretary of the Interior still retained jurisdiction over the leasing of the lands of adult citizens not of In-

dian blood. Assistant Attorney General Campbell supplemented that opinion by another opinion of July 21, 1905, again holding that the restrictions against leasing for mineral purposes by allottees not of Indian blood were not repealed by that act. (See Appendix "B" hereto.)

The Oklahoma Supreme Court, in *Eldred* v. *Okmulgee Loan & Trust Company*, 22 Okla. 742, in an opinion handed down December 1, 1908, and in *Sharp* v. *Lancaster*, 23 Okla. 349, in an opinion handed down March 9, 1909, held that an oil and gas mining lease was an alienation and a conveyance of an interest in the land within the meaning of the Indian Appropriation Act of April 21, 1904, and that the Secretary's approval was not required.

Thereafter, the Interior Department abandoned claims of jurisdiction, as shown by the opinion of the United States Circuit Court for the Eastern District of Oklahoma, in *Moore* v. *Sawyer*, 167 Fed. 826, in which the federal court held that an oil and gas lease was an alienation and that a citizen not of Indian blood had authority to lease his allotment, exclusive of the homestead from which restrictions were not removed, for oil and gas purposes without the approval of the Secretary of the Interior.

Now it will be observed that the restrictions against alienation imposed by the various treaties and agreements with the respective tribes, prohibited the alienation of the allotment by the allottee, or his heirs, for a certain definite period of time, and

all citizens of the tribes other than those not of Indian blood remained under those restrictions until they expired by limitation or were removed by the Secretary of the Interior, or the Act of Congress of April 26, 1906 (34 Stat. L. 137).

Act of April 26, 1906.

The Act of April 26, 1906, entitled, "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory and for Other Purposes," by Section 19 thereof, extended all restrictions against alienation by full-blood *allottees* for a period of 25 years from and after the passage of the approval of that act "unless such restrictions shall, prior to the expiration of such period, be removed by Act of Congress." Section 22 of the act removed all restrictions against alienation by the heirs of a deceased allottee with this limitation: All conveyances made by full-blood Indian heirs required the approval of the Secretary of the Interior in order to be valid. *Tiger* v. *Western Investment Company*, 221 U. S. 286. Section 22 of the Act of April 26, removing restrictions against mixed-blood heirs and authorizing full-blood heirs to convey with the approval of the Secretary of the Interior, is as follows:

> *Sec. 22.* "That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which

he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. *All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.*"

Section 20 of the Act of April 26, 1906, is the only provision pertaining to leases, and applies only to *full-blood allottees.* Section 20 is as follows:

"That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of *full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and *subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; Provided,* That *allotments* of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That *all leases* entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

In *Morrison* v. *Burnette*, 154 Fed. 618, the Court of Appeals held that oil and gas leases on allotments of minors were valid when approved by the proper court—and that such leases were not subject to the approval of the Secretary. The United States never contested that decision and the Interior Department adopted it as sound law.

The restrictions imposed by the various agreements with the tribes, were as to mixed-blood *allottees* left intact and unchanged by the Act of April 26, 1906. Thus, for instance, in the Creek Nation a mixed-blood Indian allottee remains under the restrictions imposed by Section 16 of the Supplemental Creek Agreement which expired August 8, 1907 (see *United States* v. *Bartlett*, 235 U. S. 72).

Status With Respect to Leasing for Oil Purposes Under Act of April 26, 1906.

Seminoles:

Just what effect the Act of April 26, 1906, Section 20 thereof, had with respect to oil and gas leases is a question, the Seminole Agreement approved by the Act of Congress of July 1, 1898 (35 Stat. L. 567), having reserved to the tribe at least a qualified ownership and interest in the oil and other minerals. At any rate mixed-blood Seminoles were not affected by the Act of April 26, 1906, and it is clear that a Seminole mixed-blood could not, after the Act of April 26, 1906, lease his allotment for oil and gas or mineral purposes, that power being reserved to

the tribal government with the consent of the allottee and the Secretary of the Interior. Such leases had to be made by the tribal government with the consent of the allottee, and approved by the Secretary of the Interior.

Choctaw-Chickasaw:

The Choctaw-Chickasaw Supplemental Agreement of 1902 contains no provision for leasing by the allottee or his heirs for agricultural or mineral purposes, and under Sections 12, 13, 15 and 16, neither the Choctaw-Chickasaw allottee, nor his heirs, could sell or convey or lease the allotment during the period limited, with or without the approval of the Secretary of the Interior.

While Section 13 of the Curtis Bill approved June 28, 1898, empowered the Secretary of the Interior to lease the Choctaw-Chickasaw tribal lands for oil, coal, asphalt, and other mineral purposes, that authority was evidently abrogated by Section 58 of the Supplemental Choctaw-Chickasaw Agreement of 1902, which declared that, "All coal and asphalt deposits, as well as other minerals which may be found in any lands not so segregated and reserved, shall be deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands." The only thing found in either the Atoka Agreement, approved by the Curtis Bill of June 28, 1898, or the Supplemental Choctaw-Chickasaw Agreement of 1902, is the provision in the Atoka Agreement that, "No *allottee* shall lease

his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States Court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder, and no such lease or any sale shall be valid as against the *allottee* unless providing to him a reasonable compensation for the lands sold or leased." If that authority to lease was not repealed by the restrictions imposed by Sections 12, 13, 15 and 16 of the Choctaw-Chickasaw Supplemental Agreement, then Choctaw-Chickasaw allottees, irrespective of blood, could lease their allotments for oil and gas purposes for a period as long as five years, without the approval of the Secretary of the Interior.

Cherokees:

Mixed-blood Cherokee allottees were still under the leasing restrictions imposed by Section 72 of the Seminole Agreement. Mixed-blood Cherokee heirs were freed by Section 22 of the Act of April 26, 1906, from all restrictions against selling or leasing for oil and gas purposes.

Creeks:

The same is true with respect to *mixed-blood Creek allottees.* They were still under the restric-

tions imposed against leasing by Section 17 of the Supplemental Creek Agreement, heretofore quoted on page 17 of this brief, but mixed-blood Creek heirs were freed by Section 22 of the Act of April 26, 1906, from all restrictions against selling or leasing for mineral purposes, the inherited allotment.

C.

Insofar as full-blood allottees and full-blood heirs are concerned, the Act of April 26, 1906, superseded, comprehensively, all the prior agreements and laws imposing restrictions against alienation and the prior modifications thereof, allowing leasing for limited periods.

This was held in *Tiger* v. *Western Investment Company*, 221 U. S. 286, and we may pass that as settled.

D.

Section 20 of the Act of April 26, 1906, pertaining to leasing, applies only to full-blood allottees—is personal to the allottee—not affecting the full or mixed-blood heirs, and is in effect a proviso to Section 19 of the same act, which latter section deals only with the full-blood ALLOTTEE, prohibiting alienation by HIM (but not his heirs) for 25 years from the passage of the act unless Congress (not the Secretary) removes the restrictions in the meanwhile.

E.

But Section 22 of the Act of April 26 prohibited

full-blood heirs from conveying by deed or lease without the approval of the Secretary of the Interior.

It is clear that Section 20 of the Act of April 26 applies only to full-blood allottees. That section expressly says, "That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of *full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval." Section 20 is a proviso to Section 19. Section 19 dealt exclusively with full-blood *allottees* and not with inherited lands. The restrictions imposed by Section 19 absolutely prohibited any kind of alienation, by deed, lease, mortgage or otherwise, for a period of 25 years "unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress." Under Section 19 the Secretary had no power to remove restrictions or approve conveyances or any kind of alienation—the Secretary could not approve an oil and gas lease or any other kind of lease. Section 19 was absolute and prohibited any species of alienation. Such being the effect of Section 19, it was deemed wise to modify the restrictions imposed by Section 19, and consequently Section 20 was inserted, enabling *allottees* to lease. The restrictions imposed by Section 19 and modified and prescribed by

Section 20 were personal to the allottee and did not run with the land, and had no operation beyond the death of the allottee. They were personal to the allottee, like the disability of minority, disability of coverture, or the disability of a *non compos mentis.*

—*Clark* v. *Lord,* 20 Kan. 390;
McMahon v. *Welsh,* 11 Kan. 280;
Oliver v. *Forbes,* 17 Kan. 128;
Hancock v. *Mutual Trust Co.,* 24 Okla. 391;
Frederick v. *Gray,* 12 Kan. 518.

No reference is made in Section 20 to mineral leases—simply the general term "all leases," and of course that includes oil and gas and other mineral leases. Now if the Act of April 21, 1904, removing "All the restrictions upon the alienation of lands of all allottees * * * who are not of Indian blood, except minors, etc.," operated to remove restrictions against leasing for oil and gas purposes, as finally conceded by the Interior Department, and as held by the State Supreme Court in *Eldred* v. *Okmulgee Loan & Trust Company,* 22 Okla. 742, *Sharp* v. *Lancaster,* 23 Okla. 349, and by the United States Circuit Court in *Moore* v. *Sawyer,* 167 Fed. 826, it seems clear that a like construction must be given to Section 22 of the Act of April 26, 1906, insofar as mixed-blood Indian heirs are concerned. In fact no one has ever contended otherwise. The Interior Department has never contended that a mixed-blood Indian heir, after the Act of April 26, 1906, was under any restrictions against leasing the inherited allotment for oil and gas or any other purposes.

Further, as Section 20, dealing with leasing, was personal to the ALLOTTEE, it is clear that the only restrictions against a full-blood Indian heir leasing for oil purposes after the Act of April 26, 1906, are those contained in Section 22, the last paragraph of which is "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Under that proviso a full-blood Indian heir could not lease his inherited allotment for oil and gas purposes without the Secretary's approval. If an oil and gas mining lease is an alienation, within the meaning of the statute removing all restrictions against alienation, it is certainly within the restriction against all *conveyances*, without the Secretary's approval. We will show later on that an oil and gas mining lease is a conveyance. The Act of April 26, 1906, did not deal with allottees not of Indian blood nor non-Indian blood heirs, unless non-Indian blood heirs happened, *by chance*, to inherit a restricted Indian allotment. Of course under Section 22 of the Act, non-Indian blood heirs, as well as mixed-blood heirs were empowered to convey inherited allotments without regard to the blood of the allottee. Neither did the Act of April 26 undertake to deal with mixed-blood *allottees*. The Act of April 26, however, is general as to full-bloods—full-blood allottees and full-blood heirs—and applied to all the

tribes, and unless the proviso to Section 22 thereof prohibited full-blood heirs from leasing an inherited allotment without the Secretary's approval, then full-blood heirs were either free to lease without the Secretary's approval or left in the same status given them by the various agreements—*i. e.*, the full-blood heirs' status as to leasing remained, like the status of mixed-blood *allottees*—fixed by the various agreements and unchanged by the Act of April 26, 1906. Section 20 had no application to full-blood heirs. Section 20 only applied to "full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes." The language of Section 20 is clear. It says, "That after the approval of this act all leases and rental contracts (except certain class of leases) of full-blood *allottees*," etc. What leases? Leases "of full-blood *allottees*." So far as full-bood allottees and full-blood heirs are concerned, Congress intended to fix their status by the Act of 1906, both with respect to selling and conveying their own allotments and their inherited allotments, as well as leasing the same. Congress intended that the Act of 1906 should supersede all the prior laws in regard to the alienation and leasing of lands by full blood allottees, as well as full-blood heirs. Section 20 should be construed in connection with, and as a proviso to Section 19, which is as follows:

> *Sec. 19.* "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of

the lands *allotted to him* for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided however*, That *such full-blood Indians* of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinbefore provided; and every deed executed before, or after the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void: *Provided, further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Section 19 applies only to full-blood *allottees*, and unless some provision had been made for leasing, full-blood allottees would have been powerless to lease their allotments at any time within twenty-five years after the passage and approval of the act. The restriction in Section 19, "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted *to him* for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress," operated to prohibit leasing for any purpose, and especially for oil and gas or mineral purposes. In order to prohibit the allottee from leasing it was unnecessary for the prior agreements or acts or Section 19 of the Act of April 26th, 1906, to make any r e f e r e n c e to leasing. The broad restriction against alienation included within its scope a prohibition against leasing. This was expressly held by the United States Circuit Court of Appeals for the Eghth Circuit in *Beck* v. *Flournoy Live Stock & Real Estate Co.*, 65 Fed. 30. See also:

United States v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. 886;
United States v. *Flournoy Live Stock & Real Estate Co.*, 71 Fed. 576.

The broad restriction against alienation included within its scope a restriction against devising the allotment by will. *Taylor* v. *Parker*, 235 U. S. 42.

We have already shown that the restrictions in state constitutions against alienating the family homestead without the joint consent of husband and wife renders an oil lease void unless executed by husband and wife. (See authorities on pages 27-28 of this brief.)

As Section 19 imposed restrictions against the full-blood *allottees* for 25 years, it was necessary to make some provision whereby "*full-blood allottees*" could lease their allotments during the twenty-five-year period of restrictions. Thus, Section 20 is really a proviso to Section 19, and is a limitation or modification of the restrictions imposed by Section 19. Neither Section 19 nor Section 20 makes any reference to full-blood *heirs*, and as Section 19 imposed no restrictions against full-blood heirs, it can hardly be said that Section 20, as a proviso to Section 19, modified restrictions against full-blood heirs. Thus, it appears that Section 22 is the only section applying to full-blood heirs. By virtue of Section 22 a full-blood heir not only had authority to *convey* the inherited allotment in fee, with the approval of the Secretary of the Interior, but had authority to lease the same for mineral purposes, or any other purpose, with the approval of the Secretary of the Interior.

The authority to convey with the approval of the Secretary of the Interior undoubtedly included the authority to lease for mineral purposes with the approval of the Secretary of the Interior. Unless

the authority to lease for mineral purposes, subject to the approval of the Secretary of the Interior, was conferred upon full-blood heirs by Section 22, then full-blood heirs either had no authority under the Act of April 26 and from its approval, to lease inherited lands for oil and gas purposes, or any other purposes, or the full-blood heirs with respect to leasing were left under the provisions of the various agreements with the respective tribes. It was clearly the purpose of Congress to fully legislate in Section 22 with respect to the full-blood heirs, both as to conveying and as to leasing. Otherwise, as we have shown, if full-blood heirs, with regard to leasing, remained in the status fixed by the various agreements, then they could not lease with or without the Secretary's approval in the Seminole Nation, or in the Choctaw-Chickasaw Nations, and probably not in the Creek or Cherokee Nations. It can not be contended that full-blood heirs had any authority to lease for mineral purposes under the Seminole Agreement or the Choctaw-Chickasaw Supplemental Agreement. If Section 17 of the Supplemental Creek Agreement and Section 72 of the Cherokee Agreement, providing for leasing, can possibly be construed as authorizing leases by heirs, nevertheless, the heirs had absolutely no authority to lease for mineral purposes in the Choctaw and Chickasaw Nations, or in the Seminole Nation. Evidently Congress did not intend to overlook in the Act of April 26, 1906, that situation. We think Sec. 22 covered leasing and required the Secretary's approval.

As held in *Tiger* v. *Western Investment Company*, 221 U. S. 286, Congress intended by that act to repeal all former restrictions against full-blood allottees and full-blood heirs and substitute therefor the restrictions imposed against the full-blood allottee by Section 19, as modified, with respect to leasing by Section 20, and repeal all restrictions imposed upon heirs by the various agreements, and substitute therefor the restrictions imposed by Section 22 against conveying by full-blood heirs.

F.

Under Section 9 of the Act of Congress of May 27, 1908 (35 Stat. L. 312), the court having jurisdiction of the settlement of the estate of the deceased allottee acquired exclusive jurisdiction to approve any kind of conveyances including oil and gas mining leases executed by the full-blood Indian heirs. The County Court was substituted for the Secretary of the Interior as the proper Federal agency.

Section 9 of the Act of May 27, 1908, is as follows:

> "That the death of any *allottee* of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That *no conveyance of any interest of any full-blood Indian heir* in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased *allottee: Provided further, That if any member* of the Five Civilized Tribes of *one-half or more Indian blood* shall die leaving

issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

G.

Section 9 of the Act of May 27, 1908, is a substitute for section 22 of the Act of April 26, 1906, and vested in the proper County Courts all the jurisdiction formerly possessed by the Secretary under the prior act.

Except for the proviso to Section 22 of the Act of April 26, 1906, requiring "all conveyances made * * * by heirs who are full-blood Indians" to be approved by the Secretary of the Interior, full-blood Indian heirs as well as mixed-blood heirs, would have been entirely discharged from all restrictions of ev-

ery kind or character, including restrictions against leases. In *Tiger* v. *Western Investment Company*, 221 U. S. 286, this court had under consideration Section 22 of the Act of 1906, and on page 307 said:

> "Coming now to Section 22, the first part of that section gives the adult heirs of any deceased Indian of either of the Five Civilized Tribes power to sell and convey the inherited lands named, with certain provisions as to joining minor heirs by guardians in such sales. This part of the *statute would enable full-blood Indians, as well as others, to convey such lands as adult heirs* of any deceased Indian, etc., but the last sentence of the section requires the conveyance made under this provision, that is, *conveyances made by adult heirs of the character named in the first part of the section, when full-blood Indians,* to be subject to the approval of the Secretary of the Interior. This construction is in harmony with the other provisions of the act, and gives due effect to all the parts of Section 22. True, it has the effect to extend the requirement of the approval of the Secretary of the Interior as to full-blood Indians beyond the terms prescribed in Section 16 of the Act of 1902, and this, we think, was the purpose of Congress, which is emphasized in Section 29 of the act wherein all previous inconsistent acts, and parts of acts, are repealed." (Italics ours.)

If, as heretofore shown, general restrictions against alienation include a prohibition against leasing without any reference to leasing *(Barnes* v. *Stonebraker*, 28 Okla. 75; *Beck* v. *Flournoy Live Stock and Real Estate Co.*, 65 Fed. 30; *United States*

v. *Flournoy Live Stock and Real Estate Company*, 69 Fed. 886; *United States* v. *Flournoy Live Stock and Real Estate Co.*, 71 Fed. 576; *Taylor* v. *Parker*, 235 U. S. 42; *Coughlin* v. *Coughlin*, 26 Kan. 116; *Franklin Land Co.* v. *Wea Gas, Coal & Oil Co.*, 43 Kan. 518; *Palmer Oil & Gas Co.* v. *Parish*, 61 Kan. 311, 59 Pac. 640; *McKinnis* v. *Mortgage Company*, 55 Kan. 259; *Brewster* v. *Madden*, 15 Kan. 195; *Carter Oil Company* v. *Popp*, .. Okla. ...; *Francen* v. *Oklahoma Star Oil Company*, (not yet officially reported) 13 Okla. App. Court Rep. 313, ... Pac. ...; *Southern Oil Co.* v. *Colquitt*, 69 S. W. 169; *Houston & T. C. Co.* v. *Cluck*, 72 S. W. 83; *Mailhot* v. *Turner*, 157 Mich. 167, 133 Am. St. Rep. 333; *Maatta* v. *Kippola*, 102 Mich. 116, 60 N. W. 300; *Pritchett* v. *Davis*, 101 Ga. 236, 65 Am. St. Rep. 298), and if a subsequent act in such general language as that of the Indian Appropriation Act of April 21, 1904 (33 Stat. L. 189), declaring that, "All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed," operates to repeal special provisions governing leasing for oil and gas purposes, as conceded by the Interior Department *(Eldred* v. *Okmulgee Loan & Trust Co*, 22 Okla. 742; *Sharp* v. *Lancaster*, 23 Okla. 349; *Moore* v. *Sawyer*, 167 Fed. 826), then it clearly appears that Section 22 of the Act of April 26, 1906, abolished all restrictions against selling, conveying, encumbering and leasing by heirs other than full-blood heirs. Thus

undoubtedly the proviso to Section 22 of the Act of 1906 requiring "all conveyances made * * * by heirs who are full-blood Indians" to be approved by the Secretary of the Interior, included within that restriction a prohibition against full-blood heirs leasing for oil and gas mining purposes without the Secretary's approval. This was evidently the construction of the Interior Department, for on July 7, 1906, the Secretary prescribed his first rules and regulations under the Act of April 26, 1906. In the printed rules and regulations that he prescribed, the Secretary copied at length Sections 19, 20 and 22 of the Act of April 26, 1906. The Secretary's rules of July 7, 1906, are entitled, "LEASING AND SALE OF LANDS ALLOTTED TO OR INHERITED BY FULL-BLOOD INDIANS OF THE FIVE CIVILIZED TRIBES," and the premise and the first and second sections thereof are as follows:

> "The following regulations are hereby prescribed for the purpose of carrying into effect the provisions of Sections 19, 20 and 22 of the Act of Congress approved April 26, 1906 (Public, No. 129), relative to the leasing and sale of lands allotted to or inherited by full-blood Indians of the Five Civilized Tribes, said sections being as follows (here follows in full a copy of Sections 19, 20 and 22 of the Act of April 26, 1906):
>
> LEASES.
>
> "*Sec. 1.* Full-blood Indian *allottees* of the Five Civilized Tribes may, subject to the approval of the Secretary of the Interior, lease

their homesteads for agricultural purposes in case of their inability on account of infirmity or age to work or farm the same, and where leases are submitted for approval covering homestead lands, the affidavit of a physician, or other satisfactory evidence, must be furnished showing the inability of the allottee to work or farm his homestead and the reason therefor. In each case, before forwarding such lease to the Department of the Interior, it shall be the duty of the United States Indian agent at Union Agency, Muscogee, Ind. T., or such other officer as may be designated for the purpose, to make a full investigation to ascertain whether the *allottee* comes within the purview of the law, whether it will be for his best interest to lease his homestead, and whether the consideration named in the lease is a fair one. He shall also ascertain the character and responsibility of the proposed lessee. In reporting he shall furnish the information herein called for, together with such other information material to the matter in hand as he may obtain, to the Secretary of the Interior and furnish his recommendation, together with his reasons therefor, as to whether the lease should be approved.

"All *leases for mineral purposes* covering the homestead, surplus and *inherited lands of full-blood Indians of the Five Civilized Tribes,* all leases for agricultural purposes for periods in excess of one year covering such lands, and all leases for agricultural purposes for one year or less affecting the homesteads of such Indians must be made in accordance with these regulations and approved by the Secretary of the Interior, but leases covering homesteads must not include other lands."

Sec. 2. "No lease will be approved for a greater term of years than as follows: Three years for grazing purposes, five years for agricultual purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, one to be delivered to the lessee, and one to the lessor."

The remaining 28 sections pertaining to leasing for mineral purposes go on to elaborate the kind of lease, designating the terms, stating the royalty, that the leases shall be in quadruplicate parts and how they shall be filed, bond being required, and many other details.

In other words, the provision in Section 22 of the Act of 1906 requiring all conveyances made by full-blood heirs to be approved by the Secretary of the Interior was a general restriction and this theory is borne out by Section 23 of the Act of 1906, which requires wills by full-blood allottees and full-blood heirs, disinheriting the parent, wife, spouse or children, to be acknowledged before and approved by a Judge of the United States Court or a United States Commissioner. But for the provisions of Section 23, the Secretary's approval of a will by a full-blood heir, devising the inherited allotment, would be required. Likewise, but for the proviso to Section 9 of the Act of May 27, 1908, providing, "That no conveyance of *any interest* of any full-blood Indian heir in such land shall be valid unless approved by the

court having jurisdiction of the settlement of the estate of said deceased allottee," all heirs, irrespective of their degree of Indian blood, would have been completely emancipated and discharged of all restrictions of every kind and character, both as to selling and leasing imposed by prior laws. That is too plain for argument. We think this court in *Tiger* v. *Western Investment Company*, 221 U. S. 286, in the remarks found on page 309, clearly sustains our contention that Section 9 of the Act of 1908 is a substitute for Section 22 of the Act of 1906. Thus, Mr. Justice DAY said:

> "Section 9 of that act provides: '*Sec. 9.* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' etc. (35 Stat. 312.)
>
> "The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court."

As suggested, Sections 22 and 23 of the Act of 1906 are the only provisions therein pertaining to full-blood heirs, and under those sections, the full-blood heir could neither deed his land, convey it in any way, nor lease it without the approval of the

Secretary, nor could he devise it by will so as to disinherit the parent, wife, spouse or children unless the will was approved by a Judge of the United States Court or a United States Commissioner. Section 8 of the Act of 1908 enables a full-blood heir to make such a will mentioned in Section 23 of the Act of 1906. by acknowledging the same before, and obtaining the approval of a judge of a County Court of the State of Oklahoma.

We contend that Section 9 and Section 8 of the Act of 1908 contain all the legislation on the question of conveyances or leases or wills by full-blood Indian heirs. The language of section 9 "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land," is broad and swept aside all restrictions of every kind or character—abrogated all prior restrictions –with the exception "that no conveyance *of any interest* of any full blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." An oil and gas mining lease is a conveyance of an interest within the meaning of Section 9, and was so held by the Oklahoma Supreme Court in *Hoyt* v. *Fixico*, 71 Okla. . . ., 175 Pac. 517. All such leases have been universally submitted to the County Court having jurisdiction. While an oil and gas mining lease is not a conveyance of the oil and gas in place, "it is a grant * * * to such part thereof as the grantee may find."

An oil and gas mining lease for a *definite term of years, without* any provision for it to run as long as oil or gas is found in paying quantities, is a chattel real.

—*Duff* v. *Keaton*, 33 Okla. 92;
Tupeker v. *Deaner*, .. Okla. ..., 148 Pac. 853.

Such a lease grants an incorporeal hereditament.

—*Kolachny* v. *Galbreath*, 26 Okla. 772, 110 Pac. 902;
Frank Oil Company v. *Belleview Gas & Oil Co.*, 29 Okla. 719;
Priddy v. *Thompson*, 204 Fed. 955;
Kemmerer v. *Midland Oil & Drilling Co.*, 229 Fed. 872.

An oil and gas lease for a definite number of years and to *run thereafter as long as oil or gas is found in paying quantities*, being for an indeterminate period of time, creates a freehold estate: *Watford Oil & Gas Co.* v. *Shipman*, 233 Ill. 9; *Guffey* v. *Smith*, 237 U. S. 101, 116; Washburn on Real Property, 6th ed., section 124, section 336 and section 383; *Effinger* v. *Lewis*, 32 Penn. 367; *Beeson* v. *Burton*, (Eng.) 12 C. B. 647; *In re King's Freehold Estate*, (Eng.) L. R. 16 Eq. 521; *Zimbler* v. *Abrahams*, (1903) 1 K. B. 577; *People* v. *Bell*, 237 Ill. 332, 86 N. E. 593; Greenleaf's Cruise on Real Property, Vol. 1, Sec. 14, page 45.

Thornton on Oil and Gas, Section 51, says:

"Whatever rights an operator receives, unless he operates under a parol license, he re-

ceives *by virtue of the written instrument* under which he operates, and to that instrument we must look to determine what legal *interest he has in the premises.* But restricting ourselves to a lease, as such purely, the question arises, 'What interest has the lessee in the leased premises?' In the case of an agricultural lease, or the lease of a house or building, for a term of years, the interest of the lessee is easily defined by means of the decisions of the courts running back many hundreds of years. But in the case of an oil or gas lease, where the length of the term is contingent on the discovery of gas or oil in paying quantities, and on its continuance in such quantities, although limited to a specified number of years, with a right to take and carry away a part of the oil itself, a very different question is presented. The interest of a lessee under such a lease has been termed a chattel real, and not a partnership asset. 'The contract referred to was a lease on the land for a specified term,' said the Supreme Court of Pennsylvania, 'and for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of the writing there can, we think, be no doubt; *it conveyed an interest in the land;* in this respect it is distinguished from a license.' 'But although the writing is a lease, it conveyed an interest in the land—a chattel interest, however; the lease was a chattel real, but none the less a chattel.' Such an interest may be sold on execution, the purchaser being regarded as an assignee. If the lessee mortgage his interest, the mortgage must be executed in accordance with the law relating to a chattel mortgage."

It is said that ejectment does not lie in favor of the lessee and that consequently an oil lease is a

mere "illimitable vista of hope." Until development an oil and gas lease is an incorporeal hereditament, but an incorporeal hereditament is land or an interest in it. An incorporeal hereditament at common law can only be created by grant because it is incapable of livery of seizin; Jones' Blackstone, Edition De Luxe, Book 3, Sec. 268, and Book 2, Sec. 434; Washburn on Real Property, 6th Ed., Vol. 3, Sec. 2233; *Beatty* v. *Gregory*, 17 Iowa 116; *Heller* v. *Dailey*, 63 N. E. 494; *Harlow* v. *Lake Superior Iron Company*, 36 Mich. 119.

Because an oil and gas lease conveys an interest in land it is within the statute of frauds.

—*White* v. *Green*, (Kan.) 173 Pac. 974;
Robinson v. *Smalley*, (Kan.) 171 Pac. 1155;
Love v. *Kirkbride Drilling Co.*, 37 Okla. 804;
Bentley v. *Zelma Oil Company*, 76 Okla. 116, 184 Pac. 141;
Riddle v. *Brown*, 20 Ala. 412;
Hicks v. *Swift*, 133 Ala. 411, 31 South. 947;
Brown on Statutes of Frauds, Sec. 231;
Brown v. *Brown*, 33 N. J. Eq. 650;
Barnes v. *Boston & Maine R. R.*, 130 Mass. 338;
Thornton on Oil & Gas, Section 94;
Lithgow v. ....., 39 Ohio Wkly. L.

We do not care whether an oil lease is an incorporeal hereditament or a chattel real, or a free-hold estate—it conveys to the lessee the *right* to enter upon the land and extract therefrom the minerals and that right to enter, occupy, and operate for min-

erals is equivalent to all the owner of the fee possesses. The owner of the land has no unqualified ownership in the oil and gas. Oil and gas being migratory and fugitive, this court said in *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, 44 L. ed. 729, that the owner of the land himself had nothing more than the vested right to drill a hole in the land and take what oil and gas he could find. If an oil lessee has not an interest in the land, what has he? If he has a right to enter, occupy and operate and appropriate the oil and gas, he has a right that is equivalent to a deed, because he has everything the owner of the land can possibly grant or convey.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 580, this court said a conveyance of the rents and profits is a conveyance of the land and quoted Coke:

> "'For what is the land but the profits thereof?' Co. Lit. 45. And that a devise of the rents and profits or of the income of land passes the land itself both at law and in equity. 1 Jarm. Wills, (5th ed.) 798, and cases cited."

In *State* v. *Cowan*, 35 Atl. 359, the court cites a number of authorities and says: "Thus a grant of the rents and profits of a tract of land is the grant of the land itself." Why is this principle not equally true of an oil lease? It is the equivalent of a grant of the oil itself.

In *Brewster* v. *Lanyon Zinc Company*, 140 Fed. 801, Mr. Justice Van Devanter, then on the Circuit bench, said this in regard to an oil lease:

"Although the parties, with the sanction of a general practice, denominated the instrument a 'lease,' strictly speaking it was not such, but was more *in the nature* of a grant *in præsenti of all* the oil and gas in the lands described—these minerals being part of the realty—with the right to enter and search for them, and to mine and remove them when found. *Lanyon Zinc Co.* v. *Freeman,* (Kan.) 75 Pac. 995; *Dickey* v. *Coffeyville Vitrified Brick & Tile Co.,* (Kan.) 76 Pac. 398. Because, however, of the designation given to the instrument by the parties, it is here spoken of and treated as a lease. It runs to the lessee, its successors and assigns, is without limitation as to time, and plainly shows that it is designed to be perpetual, if the oil or gas shall continue, and the lessee and those claiming under it shall fulfill its stipulations. True, it was made and accepted upon certain conditions, one of which is that the premises may be reconveyed at any time at the option of the lessee; that that does not make the estate which it creates a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other. *That rule is without application to a lease for a defined and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term.* Archbold's Landlord and Tenant, 92; *Dann* v. *Spurrier,* 3 Bos. & Pul. 399; *Doe* v. *Dixon,* 9 East. 15. The present lease is of this type. It is essentially one in perpetuity."

In *Aggers* v. *Shaffer,* 256 Fed. 648, the Court of Appeals held that an Oklahoma oil and gas lease was not a mere chose in action, and that the non-resident

assignee or the resident assignor could maintain a suit in the Federal Court under the diverse citizenship section of the Judicial Code. The court held that such lease granted a present vested interest in the land, and among other things, said:

> "The appellant contends that the trial court did not have jurisdiction of the suit. The ground of jurisdiction was diversity of citizenship, and such diversity existed between the plaintiff, on the one side, and the defendants, including the appellant, on the other. But it is urged that plaintiff's suit was for the specific performance of an optional unilateral contract, was therefore to recover upon a chose in action within the meaning of Section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. L. 1091, Comp. St. Sec. 991), and since the citizenship of plaintiff's assignor was not disclosed, the jurisdiction of the court below did not appear. It is enough to say of this that by the law of Oklahoma, where the land is, a lease like that held by plaintiff grants a present vested interest in the premises *(Northwestern Oil & Gas Co.* v. *Branine,* 175 Pac. 533; *Rich* v. *Doneghey,* 177 Pac. 86), and that the right he sought to protect and enforce is not a chose in action within the meaning of Section 24 of the Judicial Code. The citizenship of plaintiff's assignor was therefore immaterial. The authority of *Brown* v. *Wilson,* 160 Pac. 94, L. R. A. 1917-B, 1184, relied on for a contrary conclusion, is destroyed by the later cases above cited.
>
> ***"Upon the nature of such leases, see Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. ed. 856, held in the Rich case, supra, to be substantially in accord with the rule in Okla-***

homa; also Kemmerer v. Midland Oil & Drilling Co., 144 C. C. A. 154, 229 Fed. 872."

In the recent case of *Rich* v. *Doneghey*, 71 Okla. ..., 177 Pac. 89, the court followed the rule announced by Justice VAN DEVANTER in *Brewster* v. *Lanyon Zinc Company, supra,* and discussing the question at length, said:

> "At the time of its execution the plaintiffs were the owners in fee simple of the land. By virtue of such ownership they had, on account of the 'vagrant and fugitive nature' of the substances constituting 'a sort of *subterranean ferœ naturæ' (In re Indian Territory Ill. Oil Co.,* 43 Okla. 307, 142 Pac. 997), no absolute right or title to the oil or gas which might permeate the strata underlying the surface of their land, as in the case of forming a part of, the soil itself. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729.
>
> "But with respect to such oil and gas, they had certain rights designated by the same courts as a qualified ownership thereof, but which may be more accurately stated as exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of their land, and explore therefor by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as might be found and obtained thereby. *This right is the proper subject of sale, and may be granted or reserved. Barker* v. *Campbell-Ratcliff Land Co. et al.,* 167 Pac. 468, L. R. A. 1918-A, 487. The right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more spe-

cifically, as designated in the ancient French, a profit *a prendre*, analogous to a profit to hunt and fish on the land of another. *Kolachny* v. *Galbreath*, 26 Okla. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; *Funk* v. *Haldeman et al.*, 53 Pa. 229; *Phillips* v. *Springfield Crude Oil Co.*, 76 Kan. 783, 92 Pac. 1119. *Considered with respect to duration, if the grant be to one and his heirs and assigns forever, it is of an interest in fee. Funk* v. *Haldeman, supra. An interest of less duration may be granted, and that for a term of years has been denominated by this court a chattel real. Duff* v. *Keaton*, 33 Okla. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472. *Such right is an interest in land.* 14 Cyc 1144; *Heller* v. *Dailey*, 28 Ind. App. 555, 63 N. E. 490. If granted in the homestead of the family, the wife must join in the conveyance. *Carter Oil Co.* v. *Popp*, 174 Pac. 747.

"A grant thereof is an alienation within the meaning of the Acts of Congress removing restrictions (Eldred v. Okmulgee Loan & Trust Co., 22 Okla. 742, 98 Pac. 929), or imposing restrictions (Parker v. Riley, 243 Fed. 42, 155 C. C. A. 572), on the alienation of allotted Indian land, and is a conveyance within the meaning of Section 9, Act Cong. May 27, 1908, c. 199 (35 Stat. L. 315), providing that 'no conveyance of any interest of any full-blood Indian heir' in land inherited from any deceased allottee of the Five Civilized Tribes, shall be valid unless approved by the County Court. Hoyt v. Fixico, 175 Pac. 517 (decided Oct. 8, 1918).

"Bearing these principles in mind, it will at once be seen that by this instrument the plaintiffs *granted to the defendant a present vested interest in their land. Brennan* v. *Hunter*, 172

Pac. 49; *Northwestern Oil & Gas Co.* v. *Branine*, 175 Pac. 533 (decided Oct. 8, 1918). That is, the right for at least five years of mining and operating thereon for oil and gas, which includes, of course, the right to explore therefor, and to extract therefrom and reduce to possession, as their personal property, such as may be found. In other words, it was a grant of the exclusive right, for the time specified, to take all the oil and gas that could be found by drilling wells upon the particular tract of land, with the accompanying incidental right to occupy so much of the surface as required to do those things necessary to the discovery of and for the enjoyment of the principal right so to take oil or gas. *No more nor greater right, except perhaps as to duration, with respect to oil and gas, could be granted.* Although there had been in terms a purported conveyance of all the oil and gas in the place, yet, by reason of the nature of these substances, no title thereto or estate therein would have vested, but only the right to search for and reduce to possession such as might be found; and when reduced to possession, not merely discovered, title thereto and an estate therein as corporeal property would vest. *Kolachny* v. *Galbreath, supra; Frank Oil Co.* v. *Belleview Gas & Oil Co.*, 29 Okla. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487; *Hill Oil & Gas Co.* v. *White*, 53 Okla. 748, 157 Pac. 710. Though denominated a lease, and in deference to custom will be so referred to herein, the instrument before us, strictly speaking, is not such, *but is in effect a grant in præsenti of all the right to the oil and gas to be found in the lands described, with the right for a term of five years to enter and search therefor, and, if found, to produce and remove them, not only during said term, but*

also as long thereafter as either is produced, and to occupy so much of the surface of the land as may be necessary for the purpose of exploration or production, or both."

See also, *Guffey* v. *Smith*, 237 U. S. 112-113; *Barnsdall* v. *Bradford Gas Company*, (Pa.) 74 Atl. 207.

A Full-blood Heir's Deed to the Oil and Gas or Other Minerals.

At this late day, after a lapse of many years, it is contended that Section 2 of the Act of May 27, 1908, must be considered as a proviso to Section 9 and a limitation upon the power of the County Courts. Section 2 is as follows:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the *allottee* if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided further*, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include

all males under the age of twenty-one years and all females under the age of eighteen years."

The first sentence in Section 2 clearly applies only to allottees—to leases by allottees if an adult, or by the guardian or curator of a minor or incompetent allottee. The proviso to Section 2 providing "that leases of restricted lands for oil, gas or other mineral purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior * * * and not otherwise," is not a proviso to Section 9. Strange to say that if it was intended by Congress to engraft the proviso to Section 2 on to Section 9 as a limitation on the power of the County Courts, Congress did not plainly say so. Thus, in *United States* v. *First National Bank*, 234 U. S. 261, Mr. Justice DAY said:

> "The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to make that intention clear, that is, *we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended it would have been easy for the legislative body to have expressed it in apt terms. Farrington* v. *Tennessee*, 95 U. S. 679, 689; *Bank* v. *Matthews*, 98 U. S. 621; *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 125 U. S. 109, 127; *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 410." (Italics ours.)

It is not the construction readily suggesting itself to the mind of any reader, and the fact that the Department did not so contend for many years is strong evidence that the construction now insisted upon is wrong.

Circuit Judge THAYER of the Eighth Circuit, one of the ablest judges ever adorned the bench in this country, said in *Ardmore Coal Company* v. *Bevil*, 61 Fed. 757, that, "*It is generally safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey.*" It is conceded that a full-blood heir may convey the fee, or a life estate, or an undivided interest in an inherited allotment with the approval of the County Court, but it is contended that a full-blood heir's inheritance is *restricted land*. We concede that it is restricted land in the sense that he can not convey it without the approval of a federal agency—the County Court—but it is not "restricted land" within the meaning of the proviso to Section 2 of the Act of 1908, and we are confident that this court never intended in *Richard* v. *Parker*, 250 U. S. 235, to commit itself to any such broad holding. We will discuss that case later on. Now, it being conceded, as it must be, that a full-blood heir can convey his inherited allotment in fee, or convey an undivided interest therein, or a life estate therein with the approval of the County Court, it must likewise be

conceded that such full-blood heir, with the approval of the County Court, can convey all the oil and gas in the land, or the coal in the land, or any other mineral, or may convey all the mineral. The full-blood heir, with the approval of the County Court, and without the consent of the Secretary can make a deed—a valid deed—disposing of all the oil and gas in the inherited allotment, or all the coal or other mineral. Every court passing on the question has held that the owner of land can convey by deed all the oil and gas, or all the coal or other mineral substances. That the owner of the land, although he has no unqualified ownership in the oil and gas in place because of its volatile character, can sell and convey the oil and gas by deed, is well settled.

—*Strother* v. *Mangham*, 138 La. ..., 70 So. 426;
Texas Co. v. *Daugherty*, (Tex.) 176 S. W. 717;
Mound City Brick & Gas Company v. *Goodspeed Gas & Oil Co.*, (Kan.) 109 Pac. 1002;
Feather v. *Baird*, (W. Va.) 102 S. E. 294;
Northcut v. *Church*, (Tenn.) 188 S. W. 220;
Snodgrass v. *Koen*, (W. Va.) 96 S. E. 606;
Paxton v. *Benedum-Trees Oil Company*, (W. Va.) 94 S. E. 472;
Hammarstedt v. *Bakeley*, (Iowa) 166 N. W. 729;
Ramey v. *Stephney*, .. Okla. ..., 173 Pac. 72;
McKinney v. *Central Kentucky Natural Gas Co.*, 134 Ky. 239, 20 Ann. Cas. 934;
Hoilman v. *Johnson*, (N. C.) 80 S. E. 249.

Or, the owner of the land may sell it, excepting the oil and gas or other minerals from the conveyance, thus retaining in himself the fee simple title to the oil and gas.

—*Barker* v. *Campbell-Ratcliff Land Co.*, .. Okla. ..., L. R. A. 1918-A, 487;
Ramey v. *Stephney*, .. Okla. ..., 173 Pac. 72;
de Moss v. *Sample*, 143 La. ..., 78 So. 482;
Preston v. *White*, 57 W. Va. 278, 50 S. E. 236;
Murray v. *Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740;
Williams v. *South Penn Oil Co.*, 52 W. Va. 181, 60 L. R. A. 795;
Chartiers Block Coal Co. v. *Mellon*, 34 Am. St. Rep. 645;
Thornton on Oil & Gas, 3rd ed., Vol 2, Sec. 919.

As a deed conveys more than a lease we would have this anomalous and absurd situation: The full-blood heir, with the approval of the County Court, can convey all the oil and gas absolutely without reserving any royalty, but he can not convey the inherited land for a term of years for oil and gas purposes, retaining a royalty, without the approval of the Secretary of the Interior.

We therefore have this conundrum: If an oil and gas lease is not a conveyance within the meaning of Section 9 of the Act of May 27, 1908, and the County Court has no jurisdiction to approve it, is a deed to the oil and gas or other minerals a lease and

therefore subject to approval by the Secretary of the Interior?

It will require some hard pulling and a tremendous amount of stretching to *reform* the Act of May 27, 1908, so as to confer jurisdiction on the Secretary to approve oil and gas, or other mineral *deeds* executed by full-blood heirs. Such construction would be indefensible judicial legislation—utterly inconceivable. If the Secretary has jurisdiction and the County Courts have none, then those who have obtained mineral leases from full-blood heirs with the approval of the County Courts, all of which reserve substantial royalties to the lessors, made a mistake—they should have obtained deeds to the oil and gas or other minerals. Lawyers and judges compose a small fraction of the population of this country and laws in general were made for laymen. Fine, etherealized points, especially when developed several years after an act of the legislature or Congress under which property rights have vested, bring the law in disrepute, and add to the ranks of those who already think laws were made for the benefit of lawyers and certain classes.

Sections 1, 2, 3 and 9 of the Act of May 27, 1908, Considered and Discussed.

We have asserted that Sections 9 and 8 contain all the law pertaining to inherited lands and full-blood heirs. The second proviso to Section 9 introduces no new restriction. That proviso is as follows:

"*Provided, further,* That if any member of the Five Civilized Tribes of *one-half or more Indian blood* shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain *inalienable*, unless *restrictions* against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

This proviso applies only to the *homestead* of allottees of "one-half or more Indian blood" and continues the restrictions imposed by Section 1 on the homesteads of citizens of one-half or more Indian blood on the contingency that such citizen, at his death "leave issue surviving born since March 4, 1906," in which event, unless the Secretary of the Interior had removed the restrictions as authorized by Section 1, the homestead shall remain "for the use and support of such issue during their life or

lives, until April 26, 1931." Then if the allottee have no such issue he is authorized to dispose of the homestead by will, free from all restrictions.

Now, Section 1 classifies the lands and citizens with respect to restrictions against alienation. Section 1 is as follows:

> "*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards *restrictions on alienation or incumbrance, be as follows:* All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. *All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood,* and *all allotted lands* of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the

respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. * * * "

It will be noted that Section 1 expressly provides that "All homesteads of said allottees enrolled as mixed-blood Indians having *half or more than half Indian blood* * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April 26, 1931, *except that the Secretary of the Interior may remove such restrictions, wholly or in part.*" So, therefore, the declaration in the second proviso to Section 9 that the homestead of an allottee of one-half or more Indian blood shall remain inalienable "*unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof,*" preserves after the allottee's death the restricted status of such homesteads fixed by Section 1 on the contingency however, that such allottee of one-half or more Indian blood die leaving issue surviving born since March 4th, 1906. The degree of blood of issue born after March 4th, 1906, is *not* material. To that extent the second proviso to Section 9 qualifies the broad declaration "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land." Thus the second proviso

to Section 9 imposes no new restriction, but simply preserves the restriction imposed by Section 1 on the contingency above mentioned. We have already shown under the authorities that the broad language used in Section 1 that "*all homesteads of said allottees enrolled as mixed-blood Indians, having half or more than half Indian blood, including minors of such degree of blood * * * shall not be subject to alienation, etc., prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions,*" runs with the land, and but for Section 9 would have imposed restrictions on the heirs to the same extent that it imposed restrictions on the allottee. (*Bowling* v. *United States*, 233 U. S. 528; *United States* v. *Noble*, 237 U. S. 74; *Aaron* v. *United States*, 204 Fed. 943; *Reed* v. *Clinton*, 23 Okla. 610.) The point here suggested is this:

Section 1 is comprehensive, classifies the lands and citizens with respect to alienation, and but for the provisions of Section 2 enabling allottees to lease their restricted allotments, with the Secretary's approval, the restrictions imposed by Section 1 would disqualify the allottees falling within the restricted class from leasing their land for any term of years, or for any purpose unless the Secretary removed the restrictions. But for Section 2 the Secretary would have to remove the restrictions before the land could be leased.

Section 2 is as follows:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the *allottee* if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided further,* That the jurisdiction of the probate courts of the State of Oklahoma *over lands of minors and incompetents* shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Section 2 is in the nature of a proviso to Section 1 and qualifies and modifies the restrictions imposed by Section 1. The most significant thing about Sections 2 and 9 is this: The County Court is made the federal agency to approve *all conveyances* made by full-blood Indian heirs—conveyances of *any interest* —but the very moment Section 9, the second proviso, commences to deal with the *homesteads of allottees "of one-half or more Indian blood"* restricted by Section 1 for a period extending to April 26,

1931, the Secretary must have removed the restrictions in order to relieve such restricted homestead of the restraint against alienation. In other words, Section 9 expressly defines the only land over which the Secretary of the Interior retains jurisdiction, to-wit, the homestead of a citizen "of one-half or more Indian blood," which is expressly restricted by Section 1. It is hardly necessary for us to call the court's attention to the rule of statutory construction, "That the express mention of one person, thing, or consequence is tantamount to an express exclusion of all others."

—Black on Interpretation of Laws, page 146;
Lewis' Sutherland Statutory Construction,
Vol. 2, Sec. 491.

The first sentence in Section 2 clearly applies to *allottees*—that is what it says—"That all lands other than homesteads allotted to members of the Five Civilized Tribes, from which the restrictions have not been removed, may be leased by the *allottee*, if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal." Then, the provisos, first and second, are as follows:

First Proviso:

"That leases of restricted lands for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the

Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

It is now contended that the words "restricted lands" apply to any lands whose alienation is prohibited, except with the consent or approval of a federal agency and that the County Court has been designated a federal agency to approve conveyances by full-blood heirs, and that lands inherited by full-blood heirs are therefore restricted lands. Of course, they are restricted lands in the sense that they can not be alienated except by the approval of the County Court, but they are not restricted lands in the sense of the first proviso to Section 2. "*Restricted lands,*" as that term is used and meant in Section 2, refers to lands made inalienable by Section 1 at any time prior to April 26, 1931, "*except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of SALE and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.*" Thus, under Section 1 the Secretary had no power to approve conveyances, or deeds, or leases of any kind or character. Under Section 19 of the Act of April 26, 1906, the full-blood allottee was restricted for 25 years, the Secretary having no authority to either remove restrictions or approve conveyances. But for the enabling provisions of Section 2 of Act of May 27, 1908, granting the right to lease, lands restricted by Section 1 can not be leased. The only way a lease could be acquired on restricted

lands under the provisions of Section 1 would be for the Secretary to remove all restrictions and allow the land to be sold. Congress deemed it wise to modify the restrictions imposed by Section 1 so as to allow leasing by the allottee, such leases however for oil and gas and mining purposes, and ordinary leases for more than five years to be made with the approval of the Secretary. Under Section 1 the Secretary had no authority to approve a lease or consent to the leasing of an allotment. Under Section 9 the jurisdiction of the County Court to approve conveyances made by full-blood heirs included authority to approve leasing. Just as obvious, the power of the Secretary under Section 22 of the Act of April 26, 1906, to approve conveyances included the power to approve leases. But under Section 1 of the Act of 1908, the Secretary had no such power—his power was confined to an actual removal of restrictions. *Instead of Section 2 operating as a restriction against leasing it operates as a modification of the restrictions contained in Section 1, the restrictions in Section 1 being modified so as to allow allottees to lease with the approval of the Secretary.* No such modification was necessary to permit full-blood heirs to lease for mineral purposes or other purposes because the County Court, under Section 9, was given authority to approve conveyances and that included, *instead of excluding*, the power to lease with the court's approval. Sections 1 and 2 thus construed is a mere continuation of the prior and established policy of Congress to first impose

absolute restrictions against alienation and then modify the restrictions so as to permit leasing. Again the question occurs:

If Congress had intended to require the Secretary's approval of oil and gas leases, or mineral leases executed by full-blood heirs, it should have been careful to so state in Section 9, especially in view of the fact that Congress, in Section 1, authorized the Secretary to remove restrictions.

Turning to the books upon statutory construction, we find that, "A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operating of the enactment, or makes special provision for cases excepted from the general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent."

—Black on Interpretation of Laws, page 270.

The same authority further says:

> "The natural and appropriate office of a proviso to a statute or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence, it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope."

—Black on Interpretation of Laws, page 273.

Another eminent authority says:

"The natural and appropriate office of the

proviso being to restrain or qualify some preceding matter, it shall be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. *If it be a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect.*"

In the same section the author further says:

"The proper function of a proviso being to limit the language of, it will not be deemed intended from *doubtful* words to enlarge or extend the act or provision on which it is engrafted. Where it follows and restricts an enacting clause generally in its scope and language, it is to be strictly construed and limited to objects fairly within its terms."

—Sutherland on Statutory Construction, Vol. 2, Sec. 352.

In delivering the opinion of the court in the case of *United States* v. *Dickson*, 15 Peters 141, 165, Mr. Justice STORY said:

"We are led to the general rule of law which has always prevailed, and because consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is af-

terwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions, only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

That a proviso is construed strictly and takes no case out of the enacting clause which does not clearly fall within its terms, see the following authorities:

Ryan v. *Carter*, 93 U. S. 78, 85, 23 L. ed. 808;
United States v. *Alston Newhall & Co.*, 91 Fed. 529;
Carter v. *Hobbs*, 92 Fed. 599;
Wall v. *Cox*, 101 Fed. 409;
In re Matthews, 109 Fed. 614;
Boston Safe Deposit & Trust Company v. *Hudson*, 68 Fed. 760;
United States v. *Schilerholz*, 137 Fed. 618;
Gould v. *New York Life Insurance Co.*, 132 Fed. 929;
Murray v. *Beal*, 97 Fed. 569;
Paxton Lumber Co. v. *Farmer's Lumber Co.*, 50 Am. St. Rep. 596.

Not only will the proviso be strictly construed but the general rule of interpretation is that a proviso must be construed with reference to the subject-matter of the *section of which it forms a part*, unless there is a manifest legislative intention that it should limit the operation of other sections of the act.

—*Boston Safe Deposit & Trust Company* v. *Hudson*, 68 Fed. 760;

United States v. *132 Packages of Spiritous Liquors*, 65 Fed. 983;
Chattanooga R. & C. R. Co. v. *Evans*, 66 Fed. 814;
In re Matthews, 109 Fed. 614;
McRae v. *Holcomb*, 46 Ark. 306;
Bragg v. *Clark*, 50 Ala. 363;
Black on Interpretation of Laws, page 275;
Sutherland Statutory Construction, Vol. 2, Sec. 352.

Second Proviso:

The second proviso to Section 2 is incomprehensible on any other theory than that section 2 has no application to Section 9, and in no sense refers to mineral leases executed by full-blood heirs. The second proviso to Section 2 says: "That the jurisdiction of the probate courts of the State of Oklahoma *over lands of minors and incompetents* shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Now if Congress intended to confer jurisdiction on the Secretary of the Interior to approve mineral leases executed by full-blood heirs, why did the second proviso to Section 2 make *"the jurisdiction of the probate courts"* subject to the veto or approval of the Secretary as to oil leases only *"over lands of minors and incompetents"*? Guardians of minor full-blood heirs have made lots of oil and gas leases under the order and direction of the probate

court without it occurring to anyone that such leases were subject to the Secretary's approval. And this court recently in *Annie Harris* v. *Bell,* decided November 15, 1920, held that inherited lands of full-blood minors were subject to sale by the guardian under order of the proper probate court, although the proviso to the 3rd paragraph of Section 6 of the Act of May 27, 1908, says: "That no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise." County Courts have not undertaken to exercise jurisdiction to sell through a guardian the *allotments* of full-blood minors restricted by Section 1 of the Act of May 27, 1908. If we be wrong, then we have this situation: A full-blood allottee can neither sell nor lease his land for certain purposes at any time before April 26, 1931, unless the Secretary removes restrictions or approves the lease, but a minor full-blood heir's inherited land may be sold or mortgaged by the guardian, under order of the proper probate court, or the adult full-blood heir can sell or mortgage his inherited land or deed the minerals therein with the approval of the County Court, but another and different agency, to-wit, the Secretary, must approve a lease executed by either the guardian or by the adult heir.

It seems to us that the second proviso to Section 2, expressly subjecting the judgment of the probate court approving a mineral lease executed by the guardian of a minor or incompetent to the Secretary's

veto or approval, without any express provision subjecting the same court's judgment approving an adult full-blood heir's mineral lease to the approval or veto of the Secretary, is conclusive that Congress did not intend to qualify the court's jurisdiction to approve conveyances by full-blood adult heirs by the requirement that mineral leases by the same heirs be approved by the Secretary. If Congress intended to qualify the jurisdiction of the County Courts, conferred upon them by Section 9, so as to require the Secretary's approval of mineral leases executed by the same heirs, it is strange Congress did not say so, especially in view of the fact that Congress did expressly make the jurisdiction of the same courts "over lands of minors and incompetents" with respect to mineral leases, subject to the Secretary's veto or approval. The maxim "expressio unius est exclusio alterius" is certainly applicable.

***Parker* v. *Richard*, 250 U. S. 235.**

It is contended that this court in the above styled case, handed down June 2nd, 1919, settled this question adverse to our contention. The syllabus as prepared by the reporter is misleading. The point involved in this case was not before this court in *Parker* v. *Richard*, and we are not at war with that decision. The point here involved is whether or not an oil and gas mining lease executed by full-blood heirs, with the approval of the County Court, is valid without the approval of the Secretary of the Interior, and that point was not in the *Parker-Richard* case.

In *Parker* v. *Richard*, the guardian of a full-blood minor Creek *allottee*, during the lifetime of the allottee, executed an oil and gas mining lease, which, of course, under Section 2 of the Act of May 27, 1908, was subject to approval by the Secretary of the Interior. The lease was executed by the allottee's guardian under the order of the County Court, was on a Departmental form and expressly subject, according to the terms of the lease, to the Secretary's approval. The guardian's ward, being a full-blood allottee, no valid lease for oil and gas purposes could have been made without the Secretary's approval. There was no contention about the validity of the lease or the proper manner of its execution and approval by the Secretary. After the lease had been executed by the guardian of the allottee, under the order of the County Court, and after its approval by the Secretary, the allottee died and the question presented was whether or not the Interior Department lost jurisdiction over the royalties on account of the death of the allottee, the lessor. This court held that under the terms of the lease and the regulations of the Secretary prescribed under the authority of Section 2 of the Act of 1908, the Interior Department did not lose jurisdiction over the royalties. But the question as to whether or not the full-blood heirs of a deceased allottee can make an oil and gas lease without the approval of the Secretary of the Interior was not involved, and we do not think this court intended to decide that ques-

tion. The opinion in *Parker* v. *Richard* must be construed with reference to the circumstances of that particular case and the question actually under consideration; and the authority of that decision as a precedent is limited to the points of law which were actually raised by the record, considered by the court and *necessary* to the decision of the case. There can be no question about the jurisdiction of the Secretary to approve the lease executed by the guardian of the allottee in *Parker* v. *Richard*. But after the death of an allottee whether or not a full-blood heir can make an oil and gas lease with the approval of the County Court, and without the approval of the Secretary, was not involved in that case. Not being involved, *Parker* v. *Richard* is by no means conclusive of the question here involved.

Black on the Law of Judicial Precedents, page 49, in discussing the interpretation of judicial decision, says that the language of a judicial decision is to be construed with reference to the circumstances of the particular case, and the question actually under consideration, and that the authority of the decision as a precedent is limited to those points of law which were raised by the record and *necessary* to a determination of the case. Black says:

> "This is a very fundamental principle in the theory of judicial precedents, and has been repeatedly recognized and asserted by the courts, as well as by theoretical writers. 'A law or rule of law made by judicial decisions,' says Austin, 'exists nowhere in a general or abstract form.

It is implicated with the *peculiarities* of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals; and in order that its import may be correctly ascertained, the circumstances of the case to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. The reasons given for each decision must be construed and interpreted according to the *facts of the case* by which those reasons were elicited, rejecting as of no authority any general propositions which may have been stated by the judge, but were not called for by the facts of the case or necessary to the decision. The reasons when so ascertained must then be abstracted from the detail of circumstances with which in the particular case they have been implicated. Looking at the reasons so interpreted and abstracted, we arrive at a ground or principle of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct. Without this process of abstraction, no judicial decision can serve as a guide of conduct or can be applied to the solution of subsequent cases. *For as every case has features of its own*, and as every judicial decision is a decision on a specific case, a judicial decision as a whole, or as considered *in concreto*, can have no application to another and therefore a different case."

In *Cohens* v. *Virginia*, 6 Wheat. 264, Chief Justice MARSHALL said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those

expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. *The question actually before the court is investigated with care and considered in its full extent.* Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Black on Judicial Precedents further says:

> "It may not be out of place here to remark, as the subject seems to be so often and by so many misunderstood, that the generality of the language used in an opinion is always to be restricted to the case before the court, *and it is only authority to that extent.* The reasoning, illustrations, or references, contained in the opinion of the court, are not authority, not precedent, but only the points in judgment arising in the particular case before the court."

In construing Section 9 of the Act of May 27, 1908, this court, in *Parker* v. *Richard*, said, "There is nothing in the proviso indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the *lease or the royalties.*" This court did not say that Section 9 does not indicate that it was not the intention of Congress "to commit to the court the *leasing* of full-blood heirs' inherited lands for oil and gas purposes," but says that the proviso to Section 9 does not indicate an intention upon the

part of Congress "to take from the Secretary or to commit to the court the supervision of matters pertaining to the *lease or the royalties,*" made by the allottee before his death. There is a vast difference between holding that the Secretary continued to have supervision over a lease executed by an *adult full-blood allottee* or the guardian of a full-blood *allottee;* and holding that the Secretary has authority and the County Court has none to approve a lease executed by the full blood heirs of a deceased allottee. We can best analyze and emphasize our interpretation of the opinion in *Parker* v. *Richard* by quoting therefrom and italicizing certain parts of the opinion. Thus the court says:

> "The questions to be considered are whether the land covered by the lease is land from which restrictions on alienation have been removed, *and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of the royalties has terminated.*
>
> "The land was part of the Creek tribal lands and was allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500, the allottee being a minor and an enrolled Indian of the full-blood. In *1912,* while he was yet *a minor,* the oil and gas lease was given by his guardian, the lease being approved by the court having jurisdiction of his estate and by the Secretary of the Interior. The allottee died in 1916, while still a minor, and left his father, a full-blood Creek Indian, as his only heir. Approximately $280,000 in royalties have accrued under the lease—part before and part

since the allottee died. These royalties have been collected by the defendants *pursuant to the terms of the lease and the regulations of the Secretary of the Interior* and are being held by them in trust under a provision in the regulations which authorizes them to retain and care for such funds 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.' The plaintiffs are the administrators of the estate of the deceased allottees."

After having thus stated the case, the court discusses the Act of May 27, 1908, as follows:

"By Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress declared that 'all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, *except that the Secretary of the Interior may remove such restrictions*, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.' *There was NO SUCH REMOVAL in this instance and it is conceded that at the date of the lease and at the time of allottee's death the alienation of the land was still restricted.*

"By Section 2 of the same act Congress declared that 'leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the In-

terior, and not otherwise.' The lease was given *under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity.* It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, *that the royalties thereunder should be paid to his representatives,* that, with exceptions not material here, the regulations as then or thereafter in force should be *deemed part of the lease,* and that in the event restrictions on alienation should be removed the supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands."

And, discussing the effect of the Secretary's regulations lawfully prescribed whereby the Secretary retained jurisdiction over the royalties, the court further says:

"*One of the regulations* prescribed by the Secretary deals with the payment to lessors, their guardians, heirs, etc., of moneys collected as royalties by his representatives and specially authorizes the latter, as before indicated, to withhold such payment in whole or in part for such time as may be in accord with the best interests of the *lessor or his heirs. It is under this regulation that the royalties already collected are being retained.*"

Then, going back to the Act of May 27, 1908, the court further said:

"By the Act of 1908, which imposed the restrictions on alienation and contained the leas-

ing provision, Congress further declared, in Section 9, 'that the death of any allottee * * * shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.' In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids *any conveyance of any interest of such an heir* in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified *to the extent of sanctioning such conveyances as receive the court's approval.* Conveyances without its approval fall within the ban of the restrictions. *That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control.* Thus in a practical sense the court in exercising that authority acts as a *federal agency;* and this is recognized by the Supreme Court of the State. *Marcy* v. *Board of Commissioners,* 45 Okla. 1. Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes.

"In cases presenting the question whether lands inherited from allottees by full-blood Indian heirs are freed from restrictions by Section 9, and thus brought within another provision in the same act declaring that land 'from which restrictions have been or shall be removed' shall be taxable and subject to other civil burdens, the Supreme Court of the State and the Federal Court of that district have both held that under the proviso such land remains restricted in the hands of the full-blood heirs, and so is not within the taxing provision. *Marcy* v. *Board of Commissioners, supra; United States* v. *Shock*, 187 Fed. Rep. 870.

"Entertaining a like view of the proviso, we conclude that the land covered by the lease is still restricted land."

Then the court expressly refers to the fact that the lease involved was executed by the guardian of the allottee, a full-blood, during the lifetime of the allottee. The court further said:

"As to the other question, this is the situation: Under the Act of 1908, as already shown, leases of 'restricted lands' for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not otherwise.' *The present lease was made and approved under that provision.* The land was *then restricted* and the restrictions have not since been removed. Thus the event which the *regulations* and the *lease declare* shall terminate the supervision by the Secretary of the Interior of the collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some super-

vision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat., Sections 441, 463. *West* v. *Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nasqually* v. *Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provision or in any other of which we are aware. True, it is possible under the proviso in Section 9 for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until the restrictions expire in regular course—April 26, 1931. There is nothing in the *proviso* indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the *lease or the royalties.* A purpose to do that doubtless would be plainly expressed.

"In this situation we think the authority of the Secretary of the Interior to *supervise the collection, care and disbursement of the royalties has not terminated.*"

And we suggest that if Congress intended to give the County Courts exclusive jurisdiction to approve conveyances and then make the validity of mineral leases by the same class contingent on the approval of another Federal Agency—the Secretary —it would have been extremely easy to have expressly said so.

The decision in *Parker* v. *Richard* is correct, but we believe the opinion has been misunderstood by the Interior Department. The opinion does not hold that the words "restricted lands" used in Section 2, refer to the status of lands inherited by full-blood Indian heirs. Allotments inherited by full-blood Indian heirs are undoubtedly restricted in the sense that they cannot be *conveyed* by the heirs without the approval of the County Court, and that is all this court held. Did the death of the allottee remove all restrictions so as to terminate departmental supervision over an existing oil and gas lease executed by the full-blood allottee as absolutely required by Section 2? That was the question in *Parker* v. *Richard*. The pertinent part of Section 3 of the Act of 1908 is as follows:

> "That no oil, gas, or other mineral lease entered into by any of said allottees prior to the *removal* of restrictions requiring the approval of the *Secretary of the Interior* shall be rendered invalid by this act, but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions *are removed by this act, or have been removed by previous acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any act of Congress,* shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or

his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate."

Section 4 of the Act of 1908 says "That all lands from which restrictions have been or shall be *removed*, shall be subject to taxation and all other civil burdens," etc. Section 4 is as follows:

Sec. 4. "That all land from which restrictions have been or shall be *removed* shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the *removal of restrictions*, other than contracts heretofore expressly permitted by law."

Section 5 is as follows:

Sec. 5. "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes *prior to removal* of *restrictions therefrom*, and also any lease of such *restricted land* made in violation of law before or after the approval of this act shall be absolutely null and void."

Now, the County Court has no power to REMOVE restrictions from allotments inherited by full-blood Indian heirs, and neither has the Secretary of the Interior any power to remove restrictions from inherited lands. There is a good deal of difference between approving a conveyance made by an allottee or an heir, and removing restrictions. The removal of restrictions sets the Indian or the heir at large to make his own trade, free from any advice by the Secretary or any other Federal Agency; whereas, requiring the approval by a Federal Agency necessarily contemplates that such Federal Agency, the Secretary or the County Court, shall be more or less a party to the particular transaction—that is, the sale—in the sense that such Federal Agency will advise and consent to or disapprove the particular transaction. When the approval is required the approving agency passes on the sufficiency of the consideration and the fairness of the general terms of the contract or conveyance. On the other hand, where the Secretary removes all restrictions, the allottee is set free to make his own trade and rely upon his own judgment.

In *Parker* v. *Richard*, the court reached the correct conclusions in holding that the Department did not lose supervision because *all* restrictions had not been removed, the lease having been executed by a restricted allottee, or rather his guardian, before his death. Now, Sections 3, 4, and 5, in speaking of the "*removal of restrictions*" or "*all land from which restrictions have been or shall be removed,*" refer to

lands mentioned in Section 1 of the act, removing restrictions on certain classes and authorizing the Secretary of the Interior to remove restrictions on certain other classes. *The Secretary of the Interior is given authority by Section 1 to remove restrictions upon the lands of a full-blood allottee, but he has no authority to remove restrictions upon lands inherited by full-blood Indian heirs.* Therefore, as the restrictions had not been removed on the lands inherited by Eastman Richard, that is, removed by Act of Congress or by the Secretary of the Interior, the Department clearly did not lose jurisdiction over the existing lease, but that is a far different question from the one involved here, to-wit: Has the County Court authority to approve mineral leases executed by full-blood heirs? The decision in *Parker* v. *Richard* is grounded upon the theory that the restrictions had not been *removed* as provided for in Section 1 of the Act of May 27th, and not upon the theory that "restricted lands," as that phrase is used in Section 2, includes lands inalienable without the approval of the County Court. Thus, Mr. Justice VAN DEVANTER says:

> "By Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress declared that 'all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, *except that the Secretary of the*

Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.' *There was NO SUCH REMOVAL in this instance and it is conceded that at the date of the lease and at the time of allottee's death the alienation of the land was still restricted.*

"By Section 2 of the same act, Congress declared that 'leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior, and not otherwise.' The lease was given *under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity.* It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, *that the royalties thereunder should be paid to his representatives,* that, with exceptions not material here, the regulations as then or thereafter in force should *be deemed part of the lease,* and that in the event restrictions on alienation should be removed, the supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands."

AS THE SECRETARY WAS GIVEN NO AUTHORITY by the Act of 1908 to remove restrictions from FULL-BLOOD HEIRS, or their inherited lands, but was given authority to remove restrictions from the full-blood ALLOTTEE, and as the County

Court was given no jurisdiction to REMOVE restrictions, but was given authority to APPROVE all conveyances of any interest of any full-blood Indian heir, is it any wonder that the bar, the Indian office, and those interested in leases construed Section 9 as in no way modified by Section 2? There is no absurdity in continued departmental jurisdiction after the death of a restricted allottee over a lease executed by the allottee with the approval of the Secretary. When the Secretary got jurisdiction and had control of the lease and royalties, there is nothing inconsistent in permitting him to retain such jurisdiction. But it is absurd to give the County Court jurisdiction to approve "*any conveyance of any interest*" of a full-blood heir, which necessarily includes the power to approve a conveyance of a life estate, or an undivided interest in the fee, or an absolute deed to the minerals, and then give the Secretary jurisdiction to approve mineral leases, although the Secretary, while having authority to remove restrictions from the full-blood *allottee,* has no jurisdiction to remove restrictions from the *full-blood heir.* And what we mean by *removal of restrictions* is not mere power to approve a conveyance. The grant of authority to approve conveyances is not a grant of authority to remove restrictions, because the power to remove restrictions means that the Secretary may make an order striking off the restrictions against alienation, thus leaving the allottee to make his own trade without the advice or as-

sistance of the federal agency. And it is clear that the phrase "Removal of restrictions" as used in Sections 1, 3, 4 and 5, refers to something entirely different from the power to approve conveyances. The approval of conveyances involves the advice and assistance of the federal agency in the identical contract or trade, including the power to pass on the consideration and other terms of the deed or conveyance; whereas, the "removal of restrictions," as used in Sections 1, 3, 4 and 5, means wiping the slate clean and turning the Indian loose to make his own trade and judge the sufficiency of the consideration for himself without the advice and assistance of the federal agency. The Department did not, upon the death of the full-blood allottee, lose jurisdiction over mineral leases executed by him during his life time, because restrictions were not removed within the meaning of that term, as clearly indicated by Sections 1, 3, 4 and 5. Thus our argument is sound, that the words "restricted lands," as used by Section 2 of the act, mean lands from which the Secretary is authorized by Section 1 to remove the restrictions The Secretary has no authority to remove restrictions from inherited lands and Section 9 names the only federal agency who has any authority, and that is the County Court, and its authority is confined to the mere approval or disapproval of the particular conveyance in question—the County Court having no authority to remove restrictions by any order operating to allow a full-blood heir to make his own trade.

Departmental Construction.

We have said that the Department for a period of about 10 years disclaimed jurisdiction to approve oil and gas leases executed by full-blood Indian heirs. Those in the Department from 1908 to 1919 *familiar with the subject* will not deny this. We realize this court is far from the scene of the application of this act and unfamiliar with the local and departmental concurrent construction thereof, and we offer the following evidence as conclusive proof of our assertion that the Department claimed no jurisdiction for more than 10 years.

1st. It has been the uniform rule of the Department to require all mineral leases to be executed in quadruplicate on a form specially prepared by the Department. As the United States Courts take judicial notice of the rules and regulations prescribed by the Interior Department *(Caha* v. *United States,* 152 U. S. 213, 38 L. ed. 415), we refer to the following rules: Section 1 of the rules prescribed by the Secretary under the authority of the Original Curtis Bill of June 28, 1898 (30 Stat. L. 495), promulgated November 4, 1898, required leases to be made upon blank forms prescribed by the Secretary, and said that "no lease otherwise made shall be valid or have any effect whatever to vest in the lessee any right or interest either at law or in equity," and Section 2 required the lease to be in quadruplicate, and then the regulations go on to set out the various terms of the lease, fixing the royalties, etc. The Secretary's

rules prescribed for carrying into effect the provisions of Section 72 of the Cherokee Agreement, approved by the Act of Congress of July 1st, 1902 (32 Stat. L. 716), Section 2 thereof, required all leases to be in quadruplicate, one part to be filed with the Commissioner of Indian Affairs, one part with the agent at Union Agency, one to be delivered to the lessee, and one to the lessor, and also required that "All leases must follow the form approved by this Department and accompanying these regulations." These regulations go on to set out the terms of the lease, royalties, and other provisions, and the Secretary had forms printed for the use of lessees and they could be obtained for a consideration of $1.00 from the Indian Agency at Muskogee. These rules were amended on March 20, 1905, and again on April 22, 1905, on May 23, 1905, on June 8, 1905, on December 27, 1905, and on May 22, 1906. By the amendment of May 22, 1906, it is provided that "oil and gas leases executed after June 15, 1906, shall be on form 'A,' this day prescribed," and then rules were made requiring the application for the Secretary's approval to be made on form "B" and a certificate on form "C", blank forms printed by the Department. Then follows the leasing regulations approved June 7, 1906, prescribed under the provisions of Sections 19, 20 and 22 of the Act of Congress of April 26, 1906. These rules required leases to be in quadruplicate and on a form prescribed by the Secretary and application made and bond filed on forms

prescribed by the Secretary. Elaborate provisions were made for the terms of the leases and the manner of applying to have them approved, payment of royalty, etc. Section 15 thereof expressly provided

> "Oil and gas leases shall be executed upon form prescribed and furnished by the Department, and shall be accompanied by an application (Form B), under oath, and a certificate (Form C) of an officer of some bank, such forms and the form of lease (Form A) to be furnished applicants by the Indian Agent at Union Agency. The application shall be considered a part of the lease."

Section 25 of the same regulations is as follows

> "All leases which require the approval of the Secretary of the Interior must be submitted to the Indian agent, Union Agency, for transmittal *within thirty days*, from and after the date of the execution of the lease, and all such leases which have been heretofore executed must be submitted to said agent within thirty days from the date of the approval of these regulations. *No such lease presented after the time herein designated will be received by the agent or transmitted to the Department or regarded as having any effect whatever.*"

Then the revised leasing regulations of June 11, 1907, make similar requirements, with forms furnished by the Secretary and the leases required to be in quadruplicate. The same is true under the revised regulations of April 20, 1908, and the regulations of June 20, 1908, and all the regulations prescribe forms for the leases, forms for the application for approv

al, forms for bonds, and forms for affidavits, and all leases were required to be filed in the office of the Union Agency *within thirty days after date*, the validity of which regulations was sustained by this court in *Anicker* v. *Gumsbura*, 246 U. S. 110.

As late as June 1st, 1916, the Department re-promulgated its rules, Section 41 being as follows:

> "Applications, leases, and other papers must be upon forms prepared by the Department, and upon application the Indian agent at Muskogee, Oklahoma, will furnish prospective lessees with such forms at a cost of $1.00 per set."

2nd. *Now, bearing in mind that the opinion of this court in Parker* v. *Richard was handed down June 2, 1909. Honorable Cato Sells, Commissioner of Indian Affairs, in a letter dated September 18, 1919, addressed to the Secretary of the Interior, which letter was approved by Assistant Secretary Hopkins on September 23, 1919, admits that the Interior Department had not prior thereto claimed jurisdiction to approve leases executed by full-blood heirs.* The letter explains itself and is as follows (italics ours):

> "L-C 71916-19 W. D. W., Inclosure 16438
>
> September 18, 1919.
>
> "The Honorable,
>
> The Secretary of the Interior.
>
> "Sir: There is enclosed a letter dated August 21, 1919, from James B. Diggs and Faust and Wilson, Attorneys for the Gypsy Oil Co.,

submitting a brief in the matter of the application of the Gypsy Oil Company for the approval of oil and gas mining leases on commercial forms covering lands inherited by full-blood members of the Five Civilized Tribes. Zeverly and Beall, attorneys for the Sinclair Oil & Gas Company, concur in the brief and argument, and declare the readiness of that company to submit like leases for Departmental approval.

"With the brief are two oil and gas mining leases, one from Eastman Richard, husband and heir at law of Yarna Richard, to A. L. Funk, covering the NW¼ of Sec. 4, T. 17 N., R 7E. and the other from Jeanetta Richard and Eastman Richard as guardian of the estate of Jemina, Samuel, Minnie and Rina Richard, heirs of Yarna Richard, in favor of R. C. Jones & Company, covering an undivided 2/3rds interest in lot 4, Sec. 4, T. 17N, R. 7E., the homestead allotment of the deceased allottees. Each of the leases is for ten years from date (March 20, 1912, and April 22, 1912, respectively), and as long thereafter as oil or gas is found in paying quantities, and provides for a royalty of ⅛th of the oil produced. Each of the leases bears the approval of the judge of the County Court of McIntosh County. The Gypsy Oil Company owns an interest in each lease by assignment.

"The brief sets out in detail the reasons why it is considered that the Secretary of the Interior has no jurisdiction whatever over the land. That part of Section 9 of the Act of May 27, 1908, relative to the removal of restrictions upon the allottee's land by his death are quoted, and it is argued that the language of the proviso 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid un-

less approved by the court having jurisdiction of the settlement of the estate of said deceased allottee' includes leases, a number of citations being made to show that a mining lease has been considered as a conveyance of an interest in the land.

"The position taken in the brief as to the jurisdiction of the County Court of leases of land inherited by full-blood Indians had been accepted as correct, not only by the lessees and Indians, but also by the office of the Superintendent for the Five Civilized Tribes for several years. It appears that Superintendent's office had attempted to exercise no jurisdiction whatever over land of deceased Indians except in cases where the second proviso of Section 9 applies.

"Although the attorneys for the company set forth at length their reasons why they believe that leases of inherited land are not subject to the jurisdiction of the Secretary of the Interior they state that the Gypsy Oil Company is willing to have its existing commercial leases approved by the Secretary of the Interior with the understanding that the leases will be subject to the regulations of the Department of the Interior and the provisions of the Department lease form. They protest against being required to enter into a new lease on Departmental form or to have the value of the leases assessed as of the date they were originally taken. They also protest against the acreage covered by such leases being considered in the 4800-acre maximum. *They invite attention to the fact that all such leases were authorized and approved by the County Court, were purchased in the open market, and in nearly all cases the purchase was the result of competitive bidding had under judicial*

authority and subject to judicial control. They add that nearly all of the leases have been assigned to persons who purchased them, relying in full faith on such judicial determination and in the bona fide belief that the court had full and exclusive jurisdiction.

"In the opinion of the attorneys, the approval of the County Court is necessary for the validity of an oil and gas lease of land inherited by full-blood heirs and the part of the leasehold interest belonging to the lessee is free from any Departmental control, but as to the payment of royalties to the Indian the department has jurisdiction.

"*As heretofore stated the office of the Superintendent for the Five Civilized Tribes for several years attempted to exercise no jurisdiction over land inherited by full-blood heirs so that the statements contained in the brief as to the practice of leasing such land for oil and gas subject only to the approval of the County Court are correct so far as there being no attempt by the Superintendent to control such leases is concerned.*

"The question of whether land inherited by a full-blood heir is free from restrictions and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of royalties had terminated were considered in the case of *Gabe E. Parker et al.* v. *Eastman Richard and R. D. Martin.* The land of the allottee was covered by an oil and gas mining lease at the time of his death, and the royalties in question arose thereunder. The court held that until the interest of the full-blood heir was conveyed and the conveyance approved

by the court in accordance with Sec. 9 of the Act of May 27, 1908, the land was restricted.

"As to a lease on such land and the royalties arising thereunder, the court said:

> 'Under the Act of 1908, as already shown, lease of "restricted lands" for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, "and not otherwise." The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus, the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior of the collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some supervision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. R. S., Secs. 441, 463. *West* v. *Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provisions or in any other of which we are aware. True, it is possible under the proviso in Sec. 9, for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until restrictions expire in regular course—April 26, 1931. There is nothing in the proviso indicating that it is

intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the lease or the royalties. A purpose to do that doubtless would be plainly expressed.'

'In this situation we think the authority of the Secretary of the Interior to supervise the collection, care and disbursement of the royalties has not terminated.'

"From the language used by the Supreme Court of the United States in the *Eastman Richard* case, the office believes that oil and gas mining leases covering the interest of full-blood heirs must receive the approval of the Secretary of the Interior in order to be valid. *It is the opinion that no leases should be recognized which were executed after June 2, 1919, the date of the decision in the Eastman Richard case, except those on Departmental forms.*

"*As to leases executed prior to that date, which were authorized and approved by the County Court, and in the making of which no fraud is alleged, the office believes that it would be but fair and just to approve such leases and assignments thereof subject to the regulations of this Department the rates of royalty to be not less than those prescribed in the regulations, and all such royalties to be payable to the Superintendent for the benefit of the full-blood heirs.*

"It is therefore recommended that the Superintendent be authorized and directed to receive and forward for consideration, with such reports and recommendations as to him may seem proper in each case, applications for the approval of *commercial oil and gas mining leases* approved by the County Court on and before

June 2, 1919; and the assignment thereof; that the applicants be required to show that the lessors through whom they claim are the only heirs of the deceased allottee; that they furnish with the leases an abstract of title showing that there are no conflicting existing leases of record; that they be required to show the amount of development work performed and the present production of oil and gas, and that in case of conflicting leases all interested parties be given opportunity to present whatever showing they desire before the cases are submitted to the Department for action.

"The office fears that there may be attempts on the part of some persons to negotiate oil and gas mining leases on Department form with the full-blood heirs in cases where the land has been developed under commercial leases. It is not believed that any such leases should be given favorable consideration, but that the present owners of commercial leases who have in good faith taken the land should be allowed to keep such leases on condition that they submit them to the Department for approval, with bonds in the proper amount, and agree that the regulations of the Department apply thereto.

"With regard to the request of the companies that the 4800-acre rule be not applied to the leases in question, the office recommends that the rule apply in all cases where the lessee has less than the maximum acreage, and that in the event the approval of such commercial leases brings the acreage of the lessee above the maximum such leases be approved regardless of the 4800-acre limit, but that the lessee be not permitted to take any additional leases so long as his acreage equals or exceeds 4800 acres.

"It is recommended further that the Superintendent be authorized to give public notice that lessees will be entitled to retain the land leased by them on condition that they comply with the foregoing conditions within sixty days from date of notice.

Very respectfully,

(Signed) Cato Sells, Commissioner.

8-29-Meg.

Approved Sep. 23, 1919; Sgd. S. G. Hopkins, Asst. Secretary."

While we are unable to obtain a copy of the Secretary's reply, we do know that Honorable Gabe E. Parker, Superintendent of the Five Civilized Tribes, did, on October 3, 1919, promulgate the following order:

"October 3, 1919.

"*To Whom It May Concern:*

"I am in receipt of a letter from Honorable Cato Sells, Commissioner of Indian Affairs, dated September 24, 1919, authorizing me to give public notice relative to leases made by full-blood heirs in accordance with a decision of the Department of the Interior, as substantially follows:

"That the owner of a *commercial lease* made by full-blood heirs of a deceased citizen of the Five Civilized Tribes at a time *prior to June 2, 1919*, the date of the decision of the Supreme Court in the case of *Parker* v. *Eastman Richards et al.*, will be entitled to hold same where no fraud is alleged, by making application for the approval of same within sixty days from date of this notice, and complying with certain conditions.

"The Superintendent is authorized to receive and forward for consideration, with such report and recommendation as he may deem proper in each case, applications for approval of *commercial leases* approved by a County Court on or before *June 2, 1919*, and assignments thereof; that the applicant be required to show that the lessors through whom he claims are the only heirs of the deceased allottee, to furnish an abstract of title to show that there are no conflicting leases of record, and that in case of conflicting leases, all interested parties be given an opportunity to present whatever showing they desire before the cases are submitted to the Department for action; that they be required to show the amount of development work performed and the present production of oil and gas; and that the applicant agree that the rates of royalty be not less than those prescribed in the regulations, and that all payments shall be payable to the Superintendent for the benefit of the full-blood heirs.

"No leases will be recognized executed after *June 2, 1919*, except those on Departmental form.

"Any additional information at hand will be gladly furnished.

Sincerely yours,

Gabe E. Parker,
Superintendent for the
Five Civilized Tribes."

(Italics ours.)

What the Superintendent meant by "commercial lease" is a mineral lease not on a form prescribed by the Secretary but one on the customary form in

general use between non-tribal citizens. See Appendices "D" and "E".

The above letter and Departmental order is an explicit admission that the Department had not been claiming jurisdiction prior to the decision of this court in *Parker* v. *Richard*.

Besides, after the Act of May 27, 1908, the Department contended that Section 9 authorizing the County Court to approve conveyances of full-blood heirs was purely prospective and had no application to conveyances made after the act by full-blood heirs who inherited an allotment before the act, and further contended that Section 9 conferred no jurisdiction on the County Courts to approve conveyances by full-blood heirs to whom lands were allotted as the representatives of a deceased citizen who died before selecting his allotment, it being contended by the Department that lands allotted to heirs fell under the terms of Section 19 of the Act of April 26, 1906, and Section 1 of the Act of May 27, 1908, on the theory that such heirs were not strictly heirs, but allottees. The following letter was written on April 30, 1913, by Honorable Lewis C. Laylin, Assistant Secretary, to Mr. M. P. Mathis, of Konawa, Oklahoma, copies of which were forwarded to the Indian Office and Union Agency at Muskogee:

"DEPARTMENT OF THE INTERIOR.
Washington.

Mr. M. P. Mathis, April 30, 1913.
Konawa, Oklahoma.

"Sir: In reply to your letter of April 22,

1913, I have to advise you that this Department holds that allotments in the Five Civilized Tribes of Oklahoma, held by heirs who are full-blood Indians, cannot be alienated without the approval of the Secretary of the Interior where the allottee *died prior* to May 27, 1908, and that oil and gas leases on *such lands* require approval by the Secretary.

"You are further advised that the Department holds that where allotments were selected subsequent to the death of the person in whose name the selection was made the heirs succeeded to *the ownership of the land as original allottees* and not by inheritance, and that in such cases the lands are subject to restrictions to the same degree as other original allotments.

"Without attempting to advise you concerning all the possible cases which might be presented I suggest that it would be advisable to consult the Department if you are interested in any other cases not fully covered by the rulings referred to above.

Respectfully,

(Signed) Lewis C. Laylin,

Assistant Secretary.

Copies to Ind Off and Union Agency."

In *United States* v. *Knight*, 206 Fed. 145, the Eighth Circuit Court of Appeals held against the Department on the contention that the act was merely prospective, and sustained the jurisdiction of the County Court to approve conveyances executed after the act by heirs who inherited the lands before the act. The Government did not appeal. The other con-

tention that lands allotted to heirs, was rejected by every court passing on the question and finally rejected by this court in *Harris* v. *Bell,* decided at the present term. But the significant thing in Mr. Laylin's letter is the absence of any contention that the Department had jurisdiction to approve mineral leases executed by full-blood heirs after the Act of May 27, 1908. Honorable Dana H. Kelsey was United States Indian Superintendent at the time the Act of May 27, 1908, was passed, and for many years thereafter, and Appendix "C" to this brief is a copy of a letter written by Kelsey explaining his connection with the act and stating the Departmental construction. While the Departmental construction of the Act of May 27 is not conclusive nor binding, it ought not, where long relied upon, to be set aside except for cogent reasons. As said in *Heath* v. *Wallace,* 138 U. S. 573, 587, 34 L. ed. 1063, 1069, "The construction given to a statute by those charged with the execution of it is always entitled to the most respectful construction, and ought not to be overruled without cogent reasons." Or, as said in *Hahn* v. *United States,* 107 U. S. 407, "In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect." The Department immediately seized upon the opinion of this court in *Parker* v. *Richard,* and for the first time asserted jurisdiction in this class of cases. From the passage of the Act of May 27, 1908, up to the

decision of the Court of Appeals in *United States* v. *Knight*, on July 28, 1913 (206 Fed. 145), the Department claimed the County Court had no jurisdiction to approve conveyances executed by full-blood heirs inheriting the allotment prior to the date of the act—that was on the theory that the act was prospective—and also claimed jurisdiction for awhile in cases where the lands were allotted to the heirs as distinguished from the lands technically inherited by the heirs. But in all that time and up until *Parker* v. *Richard*, the Department did not claim jurisdiction to approve mineral leases executed by full-blood heirs inheriting an allotment after the Act of May 27, 1908, and now to set aside that long-standing Departmental rule, on at least a strained construction of the statute, and judicially strike down the jurisdiction of the County Courts means bankruptcy and disaster to a great many parties who invested their money in leases approved by the County Court. The notice given to the public on October 3, 1919, by Honorable Gabe E. Parker, Superintendent of the Five Civilized Tribes, that the Department would consider applications for the approval of *commercial leases* approved by the County Court on or before June 2, 1919 (the date of this court's opinion in *Parker* v. *Richard*), shows conclusively that the Department is aware of the great number of these leases and the disastrous and inequitable consequences following from a decision adjudging them void for the want of the Secretary's approval. We

might pause here to say that a *commercial lease* is a mere name for mineral leases not on Departmental form. The commercial lease carries a royalty from one-eighth of the proceeds of the oil to one-half as the maximum—just as the parties may agree. Whereas, the Departmental lease always requires one-eighth of the oil as royalty. The commercial lease is on a short form and the Departmental lease is on a lengthy form hedged about with numerous regulations, etc.

Further on Departmental Construction.

It may be suggested that the Secretary of the Interior has indicated a willingness to protect bona fide lessees by his notice of October 3, 1919, published by the Superintendent of the Five Civilized Tribes, wherein he says that *commercial* leases may be submitted for approval and will be approved where there is no fraud charged. Of course it is easy to charge fraud and a charge of fraud before the Department, though sustained by no evidence, discounts the opportunity to get a lease approved, and then besides it is difficult to get the Department back to the atmosphere surrounding the execution of a lease many years before it ever proved valuable and the temptation to compel the lessee to pay an extra bonus is almost irresistible, although the bonus, at the time the lease was executed, was entirely adequate and reasonable. Subsequent developments however having proven the property valuable it is hard

to resist the temptation to make the lessee divide his good fortune with the lessors. Then besides there is no such thing as owning property where the validity of the title is contingent upon the capricious whim of some official who can not be controlled by any rules of law and subject only to his arbitrary whim, for which he is required to give neither rhime nor reason. The validity of these leases, if subject to the approval of the Secretary, is absolutely contingent upon the discretion of the Secretary, and the courts have no jurisdiction to review his discretion or control it in advance. *Anicker* v. *Gunsburg*, 246 U. S. 110

We are not complaining, however, that the Secretary has not been fair to our clients. We can not speak for others. The thing is that no man owns property where the title is contingent upon the discretion of a third party, though he may be a high Government official; and having invested large sums of money—one of our clients over two million dollars—in purchasing such leases after they were developed, we feel constrained to suggest that we are interested in sustaining the validity of the leases without the necessity of the Secretary's approval.

Question:

Is a commercial lease executed by full-blood Indian heirs after the Act of May 27, 1908, and approved by the court, rendered valid by the Secretary's approval, the lease not having been made sub-

ject to the Secretary's approval, but in violation of his rules, and without any intention of the lessor and lessee to submit it to the Secretary's approval?

In other words, can the Secretary now approve these commercial heir leases and render them valid if they were invalid for the want of his approval? After the Department construed the opinion in *Parker* v. *Richard* as holding the courts had no jurisdiction to approve such leases, full-blood heirs, without any allegation of fraud, and generally at the instance of some third party who hoped eventually to get the lease, commenced suits in the courts to cancel such leases on the allegation that they were void because not approved by the Secretary, although approved by the County Court, and in those cases the Indian lessors and their co-agitators are contending that under Section 5 of the Act of May 27, 1908, such leases are absolutely void, no more than a blank piece of paper, and that the Secretary can not render them valid by now approving them. They contend that such leases were not taken subject to the Secretary's approval and that consequently they can not be subsequently approved, especially after the lessors have commenced a suit to set them aside. They contend that the Secretary is powerless to remedy the great wrong brought about by the Department's long-standing construction and disclaimer of jurisdiction; that the leases not having been made subject to the Secretary's approval as expressly provided in Departmental rules, they are void be-

cause taken in violation of law and under Section 5 of the Act of May 27, 1908, their invalidity can not be obviated by the Secretary's approval. Thus it will be seen that no matter what the Secretary may do, we will be involved in hazardous litigation for several years.

We hope we have been able to get the court in the atmosphere of this condition, and feeling confident that the question here involved was not decided nor intended to be decided in *Parker* v. *Richard*, we respectfully submit that the opinion in this case should sustain the jurisdiction of the County Courts, and remove from millions of dollars' worth of leases taken in good faith, the cloud cast upon their validity by the Departmental construction of the opinion of this court in *Parker* v. *Richard*.

Respectfully submitted,

GEO. S. RAMSEY,
JAMES A. VEASEY,
JOHN M. CHICK,
G. EARL SHAFFER,
EDGAR A. DE MEULES,
JAMES C. DENTON,
MALCOLM E. ROSSER,
VILLARD MARTIN,
Amici Curiæ.

Appendix.

Appendix "A"

The following is a copy of the opinion of Assistant Attorney General Campbell:

"The third question submitted is: 'Whether, under said second proviso, leases heretofore duly made under said acts confirming agreements with said nations, by members of the Seminole, Choctaw and Chickasaw Nations, are legal and binding without the approval of the United States Indian Agent at the Union Agency and the Secretary of the Interior under rules and regulations to be prescribed under said provisions of the Indian Appropriation Act.'

"The matter referred to as 'the second proviso,' is, presumably, the extract first herein quoted from the Indian Appropriation Act. The paragraph in which it appears has two provisos, in the second of which is found this provision removing restrictions from alienation. That provision makes no reference to leases as such.

"The matters of alienation of lands by Indian allottees and of leasing, are treated of and provided for in the various agreements and acts as entirely separate and distinct matters. It is true a lease of land in a certain sense is an alienation. It transfers to and vests in the lessee certain rights of possession and use of the land but does not convey to him the title. The alienation

from which it was intended by the Indian Appropriation Act to remove restrictions, was that character of proceedings which would involve the sale and transfer of the title. The provisions of the various agreements and laws relative to and governing the leasing of allotted lands were not intended to be and are not affected by this provision of the Indian Appropriation Act. A lease that was before not legal or binding without the approval of the Indian Agent and the Secretary of the Interior, is now equally ineffective without such approval. In other words, this is not a confirmatory provision and does not purport to cure defects in existing instruments or, in fact, to in any manner affect the leases. The rules and regulations to be prescribed under this provision of the Appropriation Act are with respect to the removal of the restrictions upon alienation by allottees of said tribes of Indian blood, except minors, and except as to homesteads and it is not contemplated by the act that such rules and regulations should have any effect upon the manner of execution or approval of leases of allotted land."

Appendix "B"

Again, on July 21, 1905, the Assistant Attorney General for the United States, in an opinion delivered at the request of the Secretary of the Interior, over a contest for a lease between Meridian Oil & Gas Company and the National Oil & Development Company, for the second time passed upon this question. The Assistant Attorney General said:

"The contention in behalf of the National Company that since the Act of April 21, 1904,

removing restrictions upon alienation of land of allottees of the Five Civilized Tribes who are not of Indian blood, except minors and except as to homesteads, such allottees may lease their lands without approval of the Secretary of the Interior, cannot be sustained. In the opinion of May 6, 1904, it was pointed out that the matters of alienation of land by Indian allottees and of leasing, were treated of and provided for in the various agreements and acts as separate and distinct matters, and it was said:

> 'The alienation from which it was intended by the Indian Appropriation Act to remove restrictions, was that character of proceedings which would involve the sale and transfer of the title. The provisions of the various agreements and laws relating to and governing the leasing of allotted lands were not intended to be and are not affected by this provision of the Indian Appropriation Act'."

Appendix "C"

Tulsa, Oklahoma, Dec. 22nd, 1920.

Mr. Geo. S. Ramsey,
Attorney at Law,
Muskogee, Okla.

Dear Sir: Acknowledging your letter of the 6th inst., calling attention to Sections 2, 3 and 9 of the Act of Congress approved May 27, 1908, known as the "Removal of Restrictions Act—Five Civilized Tribes."

You ask for statement as to my understanding of the Department's interpretation of said Act, in

respect to its authority to approve oil and gas leases executed by full-blood Indian heirs.

As you know, I was in charge of this work for the Five Civilized Tribes of Indians as Indian Agent and Superintendent for nearly ten years prior to January 1, 1915, and, while I cannot, in view of the lapse of time, recall the names of any specific cases where the Department construed Section 9, my recollection is very distinct that there were instances where leases were executed by the full-blood heirs of allottees, such leases presented for the approval of the Department, and I was instructed, or authorized to say, that such leases did not require Departmental approval, except in the case of homesteads inherited by a certain class of minors, particularly covered by the proviso of said Section 9.

I was frequently in Washington in consultation with the officials of the Department of Interior and the matter of the jurisdiction of the Department with reference to the sale and leasing of inherited lands was discussed with them, not only immediately after the passage of the Act of May 27, 1908, but at different times thereafter, and at no time prior to the decision in the so-called *Parker-Richards* case, during my entire service, was there any contention that leases for oil, or gas, or any other purpose, made by the heirs of deceased *allottees* of the Five Civilized Tribes, with the one exception of homesteads inherited by a certain class of minors, as above mentioned, required Departmental approval. The advice and instructions I received at all times were to the effect that Section 2 of said Act of May 27, 1908, ap-

plied only to *allottees* of the restricted class, and it was considered that all restrictions, so far as the Department was concerned, were removed by Section 9 on all inherited lands, with the exception, as stated, of those homesteads inherited by a certain class of minors.

Section 3 of the Act of May 27, 1908, specifically provided that the owner, or owners of any allotted land, in agreement with the lessee, on which restrictions were removed, would have the power to cancel and terminate any lease, which in itself indicates that it was the intention of Congress in all cases where the Departmental restrictions were removed by this Act, to allow the lessor and the lessee to annul their contracts, or operate same without the supervision of the Department.

During the consideration of the passage of the Act of May 27, 1908, I was called to Washington by the then Secretary of the Interior and was selected as a member of the Committee composed of the late Hon. Thomas Ryan, for many years First Assistant Secretary of the Interior, and a Mr. Lewis, from the Department of Justice, to assist the Secretary in the preparation of his reports and recommendation upon this bill. We were engaged in this work, and consultation with the officials of the Department and members of the Indian Committee of Congress, for two or three weeks prior to the passage of said Act. I recall very clearly the history of Sections 2, 3 and 9 of this bill, and I think the correspondence in the files in Washington, both in the Interior Department, and the Indian Committees of Congress, will show

that the language of these Sections was changed several times during the progress of the bill to finally meet the views of the members of Congress and the Interior Department. There was an insistent demand from Congress that all restrictions be removed from inherited lands and when the first provision of Section 9 was proposed by the Secretary of the Interior, Mr. Garfield told Judge Ryan and myself that he would not agree to all these inherited lands being absolutely turned loose without some protection for the full-blood heirs, and in a conference with Senator Owen, who was then in charge of the bill in the Senate, with Secretary Garfield, Judge Ryan, and myself, it was suggested that the full-bloods could be protected by removing the restrictions, so far as the Department was concerned, by giving jurisdiction to the Probate Courts of the State of Oklahoma to approve the conveyances of such full-blood heirs, and there was no thought in any of this discussion that there would be any future supervision by the Department over this class of cases.

I have not talked to Senator Owen about this matter since the passage of the Act under discussion, but I am quite sure he will recall this conference. Undoubtedly, the intention of Congress and the Department at that time was that the death of any allottee of the Five Civilized Tribes should remove all restrictions, either as to leasing or sale of said deceased allottee's land, so far as the supervision of the Department was concerned, except in the case of homesteads inherited by a certain class of minor heirs, as specifically covered by the second proviso of said Section 9.

I understand that the particular question as to the authority of the Department to approve leases executed by full-blood Indian heirs is now before the court in a case in which you are counsel. If you desire my testimony, or deposition, with reference to any of the facts stated herein, I will be very glad to be at your service.

Yours very truly,

DHK-EB (Signed) Dana H. Kelsey.

Appendix "D"

"COMMERCIAL LEASE."

00-304 Producers—Special 88. The Star Printery, Muskogee, Oklahoma.

OIL AND GAS LEASE.

Agreement, Made and entered into the .... day of ....., 191.., by and between .... of ..... hereinafter called lessor (whether one or more), and ..... hereinafter called lessee:

Witnesseth, That the said lessor for and in consideration of ..... Dollars cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, ha.. granted, demised, leased and let and by these presents do.. grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations and structures thereon to produce, save and

take care of said products, all that certain tract of land situate in the County of ....., State of Oklahoma, described as follows, to-wit: .....
....
of Section ...., Township ...., Range ...., and containing ..... acres, more or less.

It is agreed that this lease shall remain in force for a term of ..... years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in pipe line to which it may connect its wells, the equal one-eighth part of all oil produce and saved from the leased premises.

2nd. To pay the lessor ..... Dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making ..... own connections with the well at ..... own risk and expense.

3rd. To pay lessor for gas produced from any oil well and used off the premises at the rate of .... Dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance.

If no well be commenced on said land on or before the .... day of ....., 191.., this lease shall terminate as to both parties, unless the lessee

on or before that date shall pay or tender to the lessor, or to the lessor's credit in the ..... Bank at ..... or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of ..... Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for ..... months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the said lessor only in the proportion which ..... interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operation thereon, except water from wells of lessor.

When requested by lessor, lessee shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the owners.

Lessee shall pay for damages caused by its operations to growing crops on said land.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed the covenants herein shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof, and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail

or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes or other liens on the above described land, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

.....
.....

In Testimony Whereof We Sign, this the .... day of ....., 191..

..... (Seal)
..... (Seal)

Witnesses: .....

Appendix "E"

"COMMERCIAL LEASE."

Oklahoma Form No. 4—Olds Press, Printers, Tulsa, Okla.

OIL AND GAS MINING LEASE.

Agreement, Made this .... day of ....., 19.., by and between ..... of ....., and ..... hereinafter respectively called lessor and lessee, whether one or more.

That the lessor, for and in consideration of the sum of ..... Dollars, paid by lessee, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the lessee to be kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the lessee, for the sole and only purpose of mining and operating for oil and gas, installing gas pumps, laying pipe lines, building tanks, stations and structures thereon to produce, store and convey said products, all that certain tract of land situated in the county of ....., State of ....., described as follows, to-wit: .... of Section ...., Township ...., Range ....., containing ..... acres, more or less.

To Have and To Hold the same for the term of five years from this date and as long thereafter as oil and gas or either of them is produced from said land by lessee, ... successors, or assigns.

In consideration of the premises, the lessee covenants and agrees:

First: To pay the lessor as royalty one-eighth part of the proceeds of all the oil saved and sold from that produced on said premises and to run such oil to pipe line companies to which lessee may connect ..... well or wells under division orders placing one-eighth part of said proceeds to lessor's credit, or at lessee's option, to pay to lessor one-eighth part of the market value of such oil in the field where produced on the day the same is sold, run or stored, and in this last event, settlement shall

be made by lessee by the 15th day of each month for the royalty accrued during the preceding month;

Second: To pay lessor ..... Dollars each year in advance for the gas from each well where gas only is found while the same is being sold or used for other purposes than in operating leased premises, the lessor to have gas free of cost from such well for all stoves and inside lights in the principal dwelling house on said land during the same time by making .... own connections with the well; and,

Third: To pay lessor for gas produced from any oil well, including casinghead gas, used or utilized for other purposes than in operating leased premises, at the rate of ..... dollars per year for the time during which such gas is used or utilized; payments to be made each three months in advance.

The lessee agrees to commence drilling a well on said premises within one year from date hereof, or pay at the rate of ..... Dollars for each additional year such commencement is delayed from the time above mentioned. The completion of such well shall be and operate as a full liquidation of all rentals under this provision during the remainder of the term of this lease unless the same shall prove to be a dry hole, in which event, at the next succeeding rental paying date, the lessee may resume payment of rentals, such payments to cease on the completion of a producing well.

The lessee shall have the right to use, free from royalty or rental, oil and gas produced from said

land in drilling and operating thereon, and also water from wells other than those of the lessor.

When requested by lessor, the lessee shall bury pipe lines below plow depth. The lessee shall pay for damages caused by drilling to growing crops.

If the lessor owns a less interest than the entire undivided fee simple in above land, then the royalty and rentals hereinbefore provided shall be paid to the lessor only in the proportion which his interest bears to the entire fee.

On the termination of this lease for any cause the lessee shall have the right at all times to remove all machinery, fixtures and property placed on said premises, including the right to draw and remove casing, and all machinery, fixtures, property and casing on said premises shall remain the property of the lessee.

The lessee is given the right to assign this lease in whole or in part and if it be assigned as to a particular portion of the acreage covered thereby lessee shall be liable for royalties accruing only from production on the acreage retained and be liable for rentals only in the proportion that the acreage unassigned bears to the entire leased acreage, and lessee's assignee shall be liable for royalties accruing only from production on the acreage assigned and be liable for rentals only in the proportion the acreage assigned bears to the entire leased acreage, and in no event shall this lease be cancelled or forfeited as to lessee for failure to pay rentals or royalties so long as lessee shall pay rentals or royalties on the acreage retained, nor as to such assigns so long as

they shall pay rentals or royalties on acreage assigned.

This lease shall be forfeited or cancelled only for failure to make payments for delay in drilling, and the right to forfeit or cancel, or to have it declared forfeited, cancelled or set aside for failure to comply in whole or in part with any implied condition, covenant, stipulation, agreement, undertaking, duty or obligation, is hereby expressly waived and released.

If the leased premises are hereafter owned in severalty or in separate tracts the premises nevertheless shall be developed and operated as an entirety and royalties shall be paid to each separate owner in the proportion that the acreage owned by him bears to the entire leased acreage, and lessee shall not be bound by any change in the ownership of the leased acreage unless and until notified thereof in writing, and when such change is effected by will, deed or other written instrument said notice shall be accompanied by such instrument or a duly authenticated copy thereof. This stipulation and all other stipulations, covenants, conditions, agreements and terms of this instrument shall extend to and be binding upon the heirs, executors, successors, assigns and the legal representatives of the parties hereto:

If the lessee shall commence to drill a well within the term of this lease or any extension thereof the lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and if oil or gas, or either of them, be found in paying quantities this lease shall continue and be in force

with like effect as if such well had been completed within the term of years herein first mentioned.

All payments under this lease shall be made to the lessor, or, with like effect, check for such payment may be mailed to ..... Bank of .... or its successors, for deposit to lessor's credit.

The lessee, ... successors or assigns, shall have the right at any time, on payment of One Dollar to the lessor, ... heirs or assigns, to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, provided that this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of a suit in any court of law or equity by the lessee to enforce this lease or any of its terms or to recover possession of the leased acreage, or any part thereof against or from the lessor, ... heirs, executors, administrators, successors or assigns, or any person or persons.

.....

.....

In Witness Whereof, the parties have hereunto set their hands this the day and year first above written.

....., Lessor.

....., Lessee.

Witnesses: .....